TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 30.

THE UNITED STATES, APPELLANT,

vs.

FREDERICK A. SWEET, ADMINISTRATOR OF THE ESTATE OF ARTHUR J. SWEET, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 7, 1917.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 99.

THE UNITED STATES, APPELLANT,

vs.

FREDERICK A. SWEET, ADMINISTRATOR OF THE ESTATE OF ARTHUR A. SWEET, DECEASED.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September term, 1915, of said court, before the Honorable Walter H. Sanborn and the Honorable John E. Carland, circuit judges, and the Honorable Robert E. Lewis, district judge.

Attest:
[SEAL.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore—to wit, on the seventeenth day of August, A. D. 1914—a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Utah was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased, is appellant and the United States of America is appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

United States of America,
District of Utah—ss:

At a stated term of the United States District Court for the District of Utah, begun and held at the building used as a United States Court House in the City of Salt Lake, in said District, on the second Monday, being the Twelfth day of November, in the year of Our Lord One Thousand Nine Hundred and Six, and of the Independence of the United States of America the One Hundred Thirty First year.

Present: Honorable John A. Marshall, United States District Judge for the District of Utah.

United States of America, Complainant,
No. 282. vs. Equity.
Arthur A. Sweet, Defendant,

and

United States of America, Complainant,
No. 363. vs. Equity.
Frederick A. Sweet, Administrator of the Estate of Arthur A. Sweet, Defendant.

Bill of Revivor.

Be it remembered that heretofore and on the 22nd day of January 1907, said complainant filed its bill of complaint in the Circuit Court of the United States in and for the District of Utah, which is in words and figures following, to-wit:—and being entitled in said court and cause first above set out, to-wit:

2 (Bill of Complaint.)

To the Honorable, Judges of the Circuit Court of the United States, Eighth Circuit, in and for the District of Utah:

The United States of America, complainant herein, brings this bill of complaint against Arthur A. Sweet, who is a citizen and a resident of the State of Utah, residing in Salt Lake City in the State of Utah; and complainant alleges:

1st. That this suit in equity is brought by the authority and under the direction of Charles J. Bonaparte, Attorney-General of the United States of America.

2nd. That complainant at all the times hereinafter mentioned was, and now is, the owner in fee and entitled to the possession of the following described tract of land, situated in Carbon County in the State of Utah, to-wit:

All of Section thirty-two (32), in Township fifteen (15) south, Range eight (8) east of Salt Lake Meridian, containing about six hundred and forty (640) acres of land.

3rd. That all of said lands at said time were vacant, unreserved and unappropriated lands, rough and broken in character and unfit for agricultural purposes and of slight,
3 if any, utility or value for grazing purposes; that all of said lands at said time were well known coal lands and chiefly valuable for the coal deposits contained in said lands, and on account of the large deposits of coal in said lands were at said time of great value, to-wit, of the value of more than $10,000.00.

4th. Your complainant further alleges that Utah was admitted into the Union by an Act of Congress entitled "An Act to Enable the People of Utah to form a Constitution and State Government and to be Admitted into the Union on an equal footing with the Original States", approved July 16, A. D. 1894. That by said Act the State of Utah, upon the admission of said State into the Union, was granted Sections numbered two, sixteen, thirty-two and thirty-six in every township of said proposed State for school purposes.

5th. That at the time of the admission of the State of Utah into the Union the above described lands were well known coal lands, and said lands were chiefly valuable for the large coal deposits contained therein; that the grant of sections two, sixteen, thirty-two and thirty-six, aforesaid, by the said Act of Congress, to the said State of Utah for school purposes, made by the Act of Congress approved July 16, A. D. 1894, was not intended to cover mineral lands; that such lands were, by the settled policy of the General Government, excluded from said grant contained in said Act of Congress aforesaid.

6th. Your complainant further alleges that none of the above described lands passed to the State of Utah by the said Act of Congress because, at said time, all of said lands were well known mineral lands; to-wit, coal lands, and chiefly valuable on account of the large deposits of coal contained therein.

7th. Your complainant further alleges that in the year A. D. 1896, the State Legislature of the State of Utah created

a Board of Land Commissioners which was given direction, management and control of all the lands granted to the State of Utah by said Act of Congress, and said Land Board,
4 so created, was empowered to sell and dispose of the same in accordance with the provisions of the said Act of Congress and the Constitution of the State of Utah, which Act of the State Legislature was approved by the Governor and became a law of the State of Utah.

8th. Complainant further alleges that on or about the fifth day of November, A. D. 1904, the said State Board of Land Commissioners, by Heber M. Wells its President, and Byron Groo, its Secretary, entered into a contract in writing with one George T. Badger, by which written contract the said State Board of Land Commissioners agreed to sell to the said George T. Badger all of the above described lands as school lands for the sum of $1920.00 on the following terms and conditions, to-wit: One-tenth of the purchase price cash in hand, and the balance in ten equal annual payments, with interest at the rate of five per cent per annum on deferred payments; that on or about the 29th day of December, A. D. 1906, the said George T. Badger, for and in consideration of the sum of one dollar to him in hand paid by Arthur A. Sweet, the above defendant, sold, assigned and transferred unto the said Arthur A. Sweet the above mentioned contract, and all his right, title and interest in and to said above described lands.

9th. Complainant further alleges that on account of all of said above described lands being well known coal lands at the time Utah was admitted into the Union, and at the time the above mentioned contract was entered into by said State Board of Land Commissioners for and in behalf of the said State of Utah, the said State of Utah had no right, title or interest whatever in or to any of the above described lands, and no power or authority to enter into any contract with any person for the sale of the same; and neither the said George T. Badger nor the said Arthur A. Sweet acquired any right, title or interest whatever in or to any of the said lands by reason of the said written contract to purchase the same from the said State of Utah.

5 10th. Complainant further alleges that the said defendant, Arthur A. Sweet is now claiming the equitable title to all of the said lands and has paid to the said State of Utah the entire sum agreed to be paid for said lands, and is now demanding from the State of Utah a deed therefor conveying to him, the said defendant, all of the above described lands.

In consideration whereof and forasmuch as the complainant is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity where matters of this kind are cognizable and reviewable; to the end therefore that the defendant may full, true, direct and certain answer make to each and all of the allegations and averments in this bill of complaint complained, but not under oath (answer under oath being hearby expressly waived) your complainant humbly prays;

First. That this Honorable Court adjudges and [decree-] that neither the said George T. Badger, nor the defendant, Arthur A. Sweet, have acquired [aby] right, title or interest in or to any of the lands described in this bill of complaint by reason of the said contract made between the said George T. Badger and the said State of Utah, and assigned to the said defendant, Arthur A. Sweet.

Second. That this Honorable Court adjudge and decree that said contract made and entered into between the said George T. Badger and the said State of Utah, and assigned to the said defendant, Arthur A. Sweet, is void and that it be surrendered for cancellation.

Third. That this Honorable Court adjudge and decree that the said defendant, Arthur A. Sweet, be directed to surrender up to the State of Utah, for cancellation, any and all contracts and agreements had with the State of Utah for the purchase of any of the lands described in this Bill of Complaint.

6 Fourth. That your complainant have such other, further or different relief in the premises as may be agreeable to equity and good conscience. That complainant have judgment for costs of suit.

May it please the Court to grant unto this complainant a writ of subpoena therein and thereby commanding the said defendant, Arthur A. Sweet, to be and appear before this Honorable Court on a day to be therein named, then and there to abide and perform such decree as the Court shall make in the premises, and as shall be agreeable to equity and good conscience.

And your complainant will ever pray.

CHARLES J. BONAPARTE,
Attorney General.

HIRAM E. BOOTH,
U. S. Attorney for the District of Utah.

Solicitors for Complainant.

M. C. Burch,
Special Assistant
Attorney General.

Fred A. Maynard,
Special Assistant to the
Attorney-General.

Of Counsel.

Filed January 22, 1907. Jerrold R. Letcher, Clerk. By Margaret B. Connell, Deputy.

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7 Answer.

The answer of the above named defendant to the bill of complaint of the above named complainant.

In answer to the said bill of complaint, the said defendant, Arthur A. Sweet, says as follows:

1. Defendant admits that this suit in equity is brought by the authority and under the direction of Charles J. Bonaparte, Attorney General of the United States of America.

2. Defendant admits the due passage and approval of the Act of Congress entitled "An Act to Enable the People of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the Original States" as set out in paragraph numbered four of said bill of complaint, and admits and avers that by said Act of Congress Utah was admitted into the Union, and that upon its said admission into the Union it was granted, by said Act of Congress, sections numbered two, sixteen, thirty-two and thirty-six, in every township of said proposed State for school purposes, and that by said grant the State of Utah, was granted, by the complainant, the said lands and each of them in controversy in this suit, and set out and described in paragraph numbered two of said Bill of Complaint.

3. Defendant denies that the said grant of said lands, including the said lands in controversy in this suit as aforesaid, was not intended to cover mineral lands, and denies that mineral lands were excluded from the said grant contained in said Act of Congress, by the settled policy of the general Government, or otherwise, or at all; but on the contrary this defendant avers that neither mineral nor coal lands were in any wise excepted, reserved or withheld from the operation of said grant by the said Act of Congress, or by the settled policy of the general Government, or otherwise, or at all.

8 4. Defendant admits and avers that the Complainant was the owner of and in posession of all the lands set out and described in paragraph numbered two of said Bill of Complaint, prior to the 16th day of July, 1894, and prior to the said passage and approval of said Act of Congress, but defendant denies that the Complainant is now or was at the time of the commencement of this suit in equity, or has been at any time since the admission of Utah into the Union the owner in fee or entitled to the possession of said lands or any of them.

5. Defendant denies that the said lands, in controversy in this suit and set out and described in paragraph numbered two of said Bill of Complaint or any of them are or have been at any time, since the admission of Utah into the Union, vacant, unreserved or unappropriated lands, and denies that said lands, or any of them, are or were, at any of the times mentioned in said Bill of Complaint, unfit for agricultural purposes, and denies that said lands or any of them are or were, at any of said times, of slight utility for grazing purposes, and defendant specifically and specially denies that said lands or any part of portion thereof are now or were, at the time Utah was admitted into the Union, or [any] any of the times set out in said Bill of Complaint, known coal lands, and denies that said lands, or any portion thereof are now or were, at any of said times, chiefly valuable for coal deposits contained therein, and denies that said lands are now or were at any of said times of great value, or of the value of more than $10,000.00 or of any value whatsoever on account of coal deposits contained therein; but on the contrary this defendant avers that the said lands are not now and never have been known coal lands or coal lands in fact, and that said lands do not, nor does any portion thereof, contain any known deposits of coal of any value whatsoever, and that said lands were not, nor was any portion thereof, at any of said times, chiefly valuable for coal deposits contained therein; that said lands and every part thereof were, at all said times, and are now chiefly and principally valuable for grazing purposes and for certain timber growing thereon.

9 6. Defendant admits the passage by the Legislature of the State of Utah of the Act creating a State Board of Land Commissioners of said State in manner and form as stated in paragraph seven of said Bill, and admits that the said Land Board so created, was, by the said Act of the said State of Utah, given direction, management and control of all the lands granted to the State of Utah by the said Act of Congress, and admits that said State Board so created was,

by such Act of the Legislature of the State of Utah, empowered to sell and dispose of said lands in accordance with the provisions of the said Act of Congress, and the Constitution of the State of Utah, and admits that the said Act of the Legislature of the said State of Utah was approved by the Governor and became and is a law of the State of Utah.

7. Defendant admits that at the time mentioned in paragraph eight of the said Bill, the said State Board of Land Commissioners of the State of Utah, by its President and its Secretary, for and on behalf of the State of Utah, as in said paragraph set out, entered into a contract in writing with one George T. Badger, whereby and wherein the said State Board of Land Commissioners, for and on behalf of the State of Utah, agreed to sell to the said George T. Badger, all of said described lands in controversy in this suit, as school lands, for the price and on the terms and conditions as set out in said paragraph eight, and admits that on or about the 29th day of December, A. D. 1906, the said George T. Badger, sold, assigned and transferred unto this defendant, the said lands and all of them, and all his right, title and interest in and to the said lands. Defendant denies that the consideration paid by this defendant to the said George T. Badger for the said lands was only the sum of $1.00; but on the contrary avers that the said sale, assignment and transfer of said lands by the said George T. Badger to this defendant was for and in consideration of the sum of $2080.00 to the said George T. Badger, in hand paid by this defendant.

10 8. Defendant denies that said lands in controversy in this suit, or any part thereof, were, at the time Utah was admitted into the Union, known coal lands, and denies that at the time the above mentioned contract was entered into by the said Board of Land Commissioners for and on behalf of the State of Utah, the said lands or any part thereof were known coal lands, and denies that at said time last mentioned the State of Utah had no right, title or interest in or to any of the above described lands, and denies that the State of Utah at said time had no power or authority to enter into any contract with any person for the sale of the same, and denies that the State of Utah, at said time had no power or authority to enter into said contract with the said George T. Badger for the sale of said lands, and denies that the said George T. Badger did not acquire any right, title or interest in or to any of said lands by reason of said written contract to purchase the same, from the said State of Utah, and denies that this defendant did not acquire any right, title or interest in or to any of said lands by reason of the said written contract to purchase the same from the said State of Utah, but, on the

contrary this defendant avers that the title, both legal and equitable of all the said lands in controversy in this suit and set out and described in paragraph numbered two of said Bill, passed from the complainant to the State of Utah, under and by the terms of said grant as aforesaid, and that by said grant, the title, both legal and equitable, in said lands and each of them, became and was vested in the State of Utah at the time Utah was admitted into the Union, and that at the time the above mentioned contract was entered into by the said State Board of Land Commissioners, for and on behalf of the said State of Utah, as aforesaid, the said State of Utah had full right, title and interest in and to said lands, and all of them, and at said time the said State of Utah and the said Board of Land Commissioners had full power and authority to enter into said written contract with the said George T. Badger for the sale of said lands and all of them, and avers
that by reason of the said contract the said Badger ac-
11 quired the equitable title to said lands, and all of them,
and by the said assignment by the said George T. Badger to this defendant, this defendant acquired and now has the equitable title to said lands and all of them.

9. Defendant admits that he is now claiming equitable title to all of said lands, and admits and alleges that he has paid to the said State of Utah the entire sum agreed to be paid for said lands by the terms of said written contract and admits and alleges that he is now demanding from the State of Utah a deed therefor conveying to him all of said lands, and defendant further alleges that the said State of Utah is now ready, willing and desirous to carry out the terms of its said written agreement, and would, if it were not for the pendency of this suit in equity, execute and deliver, by and through its proper officers, to this defendant its proper conveyance, conveying to this defendant all of said lands, in pursuance with the terms of its said agreement.

All of which matters and things this defendant is ready to maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf, most wrongfully sustained.

ARTHUR A. SWEET,
Defendant.

ALBERT R. BARNES,

DICKSON, ELLIS, ELLIS & SCHULDER,
Solicitors for Defendant.

W. D. Hickson,
Of Counsel.

E. W. Senior,
Of Counsel.

Service accepted and copy received this 3rd day of August, 1907.

FRED A. MAYNARD,
HIRAM E. BOOTH,
Solicitors for Complainant.

Filed August 31st, 1907. Jerrold R. Letcher, Clerk. By Margaret B. Connell, Deputy.

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12 Replication.

The replication of the United States of America, complainant, to the answer of Arthur A. Sweet, defendant herein:

This repliant saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto saith that it will aver and prove its said Bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said Arthur A. Sweet, defendant herein, is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be, ready to aver and prove as this Honorable Court shall direct, and humbly prays as in and by its said Bill it hath already prayed.

HIRAM E. BOOTH,
United States Attorney Solicitor for Complainant.

Fred A. Maynard,
Spl. Asst. to the Attorney Gen'l.
Of Counsel.

Service accepted this 28th day of September, A. D. 1907.

A. R. BARNES,
Attorney for Arthur A. Sweet, defendant.

Filed September 28, 1907. Jerrold R. Letcher, Clerk.

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13 Bill of Revivor.

To the Honorable Judges of the Circuit Court of the United States in and for the District of Utah;

The United States of America, [compl-inant] herein, brings this, its Bill of Revivor, against Frederick A. Sweet as Administrator of the Estate of Arthur A. Sweet, Deceased; said Frederick A. Sweet being a citizen of the State of Utah, and a resident of Salt Lake City, in said District and State:

And, thereupon, your orator complains and says:

1. That on or about the 22nd day of January, A. D. 1907, the United States of America as complainant, filed its Bill of Complaint in this Court against the above named Arhur A. Sweet for the purpose, among others of obtaining a decree of said court that said Arthur A. Sweet never at any time acquired any right, title or interest in and to the following described lands, viz.:

All of Section thirty-two (32), in Township fifteen (15) South, Range Eight (8) East, Salt Lake Meridian, situate in the County of Carbon, State of Utah, containing about 640 acres of land, under and by virtue of a contract theretofore made by said Arthur A. Sweet's Assignor with the State of Utah, because of the fact that said lands are [valauable] coal lands of the United States, and were known to be chiefly valuable as such coal lands, prior to the admission of the said State of Utah into the Union, and the usual writ of subpoena issued on said day; that later said defendant filed his answer, and complainant its replication thereto, and, thereafter, by an order of this Court the testimony of complainant was offered and taken by John W. Christy, Esquire, Examiner of said Court.

II. That during the pendency of the proceedings un-
14 der said Bill of Complaint, and during the period allowed defendant for the taking of his testimony before the said Examiner, said defendant Arthur A. Sweet died on the 20th day of July, A. D. 1910, at Long Beach, in the County of Los Angeles, State of California; that, thereafter, on the 25th day of October, A. D. 1910, a petition for the appointment of an Administrator of the said estate of said Arthur A. Sweet was filed in the District Court in and for the County of Salt Lake, in the State of Utah,—said Court having jurisdiction of the subject matter thereof, and such proceedings were thereafter had on such petition that on the 27th day of January, A. D. 1911, said Frederick A. Sweet was, by an order of said court named as the Administrator of the estate

of said Arrhur A. Sweet, Deceased, and Letters of Administration thereof were on said day duly issued out of said court unto said Fredericak A. Sweet, and still remain in full force and [and] virtue, and by reason thereof said Fredeirck A. Sweet is now acting as the administrator of said estate.

III. Your orator further shows that the said suit against Arthur A. Sweet having become abated by reason of his death, complainant is advised that it is entitled to have the same revived and restored to the same plight and condition in which it was at the time of the death of the said Arthur A. Sweet, and to have the same relief against said Frederick A. Sweet, administrator of the said estate, as aforesaid.

Wherefore Your Orator Prays, that the said cause may be revived by a decree of this Honorable Court, and that it may proceed to a decree in its favor in accordance with the prayer of the original bill of complaint herein.

Your orator further prays that subpoena issue, requiring Frederick A. Sweet as the administrator of the estate of said Arthur A. Sweet, Deceased, to appear and show cause, if he have any, why this cause should not be revived, and if no cause shall be shown by said defendant Fredierick A. Sweet why said suit should not be revived, then that a decree be entered reviving said suit in favor of complainant.

15 And your orator will ever pray.

HIRAM E. BOOTH,
United States Attorney.

FRED A. MAYNARD,
Special Assistant to the Attorney-General. Attorneys for Complainant.

Filed January 31, 1911. Jerrold R. Letcher, Clerk. By Margaret B. Connell, Deputy.

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16 (Order of Submission, October 31, 1911, with leave to file Briefs.)

At this day this cause came on for trial on the testimony and proofs taken before the Examiner herein—F. A. Maynard appearing for said Complainant, and A. C. Ellis, Jr., and A. R. Barnes appearing for said Defendant. By consent, it is ordered that all testimony and proof taken in cause No. 282 (904) be considered as applying to and a part of cause No. 363 (1181).

The cause was then argued by counsel for the respective parties and submitted and by the Court taken under advisement. Thereupon defendant is given five days in which to file brief and complainant ten days to file reply brief.

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17 Condensed Statement of the Testimony, Evidence and Proceeding, had, offered and used upon the Trial and Hearing of the above entitled Cause.

18 (Testimony for the Government.)

JOSEPH A. TAFF, a witness produced by the complainant, being first duly sworn, testified:

I reside at Palo Alto, California, I am 47 years old. My profession is that of Geologist. I am at the present time connected with the Southern Pacific Company, and have been connected with the said Company since the 15th day of November, 1909. I have lived in Washington, D. C. about fifteen years, or since 1894. During those years I was employed as a geologist on the United States Geological Survey with headquarters at Washington. From 1889 to 1894 was employed as Assistant Geologist for the State Geological Survey of Texas. During 1888 I was employed upon the State Geological Survey of Arkansas. Previous to that time I was a student in the University of Arkansas in engineering and geology. From 1892 to 1894 I was a student of geology in the University of Texas where I took my degree. The degree was Bachelor of Science. I devoted a part of 1905 to an investigation of the coal fields in Carbon and Emery Counties in co-operation with the General Land Office. In 1906 I came into the same field to make some particular examinations of the classified coal lands, and during those surveys particular attention was paid to the survey and the character of the coal lands from the Book Cliffs between Sunnyside and Castle Gate and from Castle Gate southward to Carbon County, including the lands at present in question, and further southward in Sevier County towards the south end of the coal fields. I was employed there two seasons, 1905 and 1906, and during the month of July, or a large part of the month, in 1909. I was with two members of the Land Office. Mineral Inspectors, and made special investigation of the land in Section 32, Township 15, south of Range 8 East, and contiguous lands, with the special object of investigating the occurrence of coal. I contributed to the Geological Department of the Government a full ac-

19 count of the coal fields of Utah, and they appear in print and are now a part of the official records of the Government.

In the summer of 1909, with the assistance of others, I made an examination of Section 32, in Township 15, South of Range 8 East, of the Salt Lake Meridian, for the purpose of determining the question as to the character of the land and the various sections of 40 acres embraced within that section. I devoted one day to the special examination of Section 32, Township 15 South of Range 8 East. There was associated with me Mr. L. W. Walker and Joseph Jensen, Mineral Inspectors of the General Land Office. The purpose of visiting this section was the reviewing of the location of the lands with respect to its boundary lines, and reviewing the occurrence of coal; and also to inspect any additional exposures or occurrences of coal that might have been brought to light since our former examination when the tract had been also particularly examined. The prior examination was in June, 1906. At the time of that examination my corps of surveyors consisted of two parties; one of those was headed by a practical surveyor, which examined and located and traced section lines and located section corners; the other party consisted of an engineer with his assistant, who ran instruments and located the coal outcrops and coal exposures. These two divisions of the party were directly under my charge and supervision. The examination of this particular section was a part of the general work in which I was engaged, having been detailed by the Government to classify the lands in Utah. At that time careful surveys were made of the coal measures continuously from Sunnyside westerly via Castle Gate southward through this particular tract of land, and from there south of the location and occurrence of coal; an equally careful examination in order to a fair treatment of the land classification.

20 The lands have been classified since my work was done, but not re-classified.

With the exception of the southeast quarter of the northeast quarter of section 32, Township 15, south of range 8 east, the entire section contains coal, and would be classified as coal land; in fact, have been classed as coal lands. The lands contain coal and coal beds of a thickness that would warrant profitable mining and contain coal of a good bituminous grade.

The map marked "Exhibit A" for identification contains Township 15, south of Range 8 east, together with Township 16, South of Ranges 7 and 8 East. The townships represented upon the map are exact copies and tracings of the original Land Office plats on file in the General Land Office. It contains the location of Section 32, Township 15, South of Range

8 East, which is bounded on the plat by heavy black lines bordered in brown. It also shows the exact outcrop of the lowest workable coal bed through Section 32, Township 15, South of Range 8 East, and through the adjoining townships represented upon the plat. The coal outcrop or boundary line is shown in a heavy meandering black line of natural and artificial exposures of coal other than mines that were located at the time the surveys were made, are shown upon the plat by a cross (X) in black. All mines are shown by a symbol of cross (X) hammers. The [ourcrop] of the exposure of the thick sandstone formation that lies immediately above the coal bearing series is shown in and contiguous to Section 32, Township 15, South of Range 8 East by certain hatched lines. The lines indicating the coal were determined by myself at the time of the official investigations made by the Government as I have previously stated. Map marked by examiner "Exhibit A". The map was made by Mineral Inspector L. W. Walker and myself, and after being made it was particularly compared with the plat from which the tracing was made and identified as being correct in all respects as shown. It is a tracing of the original maps on file in the General Land Office in this city, and not a tracing of a tracing. My reasons for testifying that all the lands contained in this section are coal lands are; in the first place, the coal crop, or in other words, the edge of the coal beds where it comes to the surface, was traced continuously through this Township and through this Section 32, Township 15, South of Range 8 East, and in that tracing of that crop of the lowest workable coal bed, we came in contact with a mine that had been previously located and where coal had been worked, in the southeastern part of the northeast quarter of the northwest quarter of Section 32. I will refer to my notes for all the details of the coal bed. At this locality a tunnel had been driven toward the north of the coal beds for a distance of fifty feet. A tunnel, drift or entry had been opened, and at the face the coal bed was shown to be ten feet and four inches thick. It was coal without any parting or impurities with respect to the quality of the coal bed. This working is in the Southeast part of the Northeast quarter of the northwest quarter of Section 32. At this first coal bed the [the] entry was about fifty feet in length. The coal was without partings—material partings—or impurities that would affect its quality, and appeared to be a good grade of coal throughout the entry. A section of coal ten feet four inches thick showed the length of the entry from the opening to the face of the mine. I might state that the mine was not in operation at the time, but the conditions there show that all of the coal had been removed and taken away from

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the vicinity, with the exception, of course, of a small amount of slack that was thrown out on the dump at the open-
22 ing of the mine. I should imagine it was ten or twelve feet wide and ten feet six inches high. It is about fifty feet long. The coal had been already mined and taken away from the country with the exception of a small amount of slack. A short distance to the west of the first in the same legal sub-division, and about fifty feet higher in the section, was a second bed of coal. At this place an entry had been driven to a distance of a hundred and fifty feet in a direction thirty degrees west. The section of coal at the opening and face was five feet of clear coal [land] of good bituminous grade. As at the mine on the lower bed, all of the coal that had been taken from the mine had been removed with the exception of a small amount of slack. In this case the entry and height of coal was five feet, and an ordinary width, I would estimate, of probably ten feet and one hundred fifty [fifty] feet in length. There was no large chamber that I saw in this second mine.

I can give an estimate of the amount of coal taken from these mines, but it is only an estimate, as follows: The mine on the lowest coal first mentioned has had removed approximately two hundred tons; the mine on the second coal bed has had removed a little over three hundred tons. I know of no chamber or chambers in these tunnels. There is a third bed of coal occurring about ninety feet above the second, and has been prospected a short distance northwest of the second mine further up the slope. This was a shallow pit showing a clear face of the coal exposed in the bed which was six feet two inches thick of clear coal. By clear coal I mean without apparent impurities and of good quality. The opening was just a pit; a prospect pit showing the face of the coal. These three are the only openings of coal that we found on the section at the time this investigation was made. The pit is toward the central part of the northwest quarter of Section 32, Township 15, South of Range 8 East.

Simply estimating, there would be approximately, well,
23 between five hundred and five hundred and forty acres embraced within the outward and visible signs of this coal. There is, estimating, approximately one hundred acres that lies below the outcrop of the coal in the lowest corner of this section. That area includes, practically, all the southeast quarter of the northeast quarter, a little along the south edge of the north half of the northeast quarter; a small area in the southeast part of the northeast quarter of the northwest quarter; a small area in the northeast part of the southeast quarter of the northwest quarter; a small area in the north-

eastern part of the northeast quarter of the southwest quarter; a large part of the northwest quarter of the southeast quarter; a small area in the northeastern part of the southeast quarter of the northeast quarter. The larger part of the southeast quarter of the northeast quarter, and that particularly and specifically described is about a hundred or a hundred and twenty acres of land in that section. They are not coal lands because they are below the lowest coal horizon in that section. All the rest of the surface lies above the outcrop of coal. The coal beds extend under the land. The geological reasons which establish the fact that the land is underlaid with coal in this section are: In the first place the cropping of the coal bearing rocks in which these particular coal beds have been described occur, extend [prietically] in a horizontal direction from the outcrop into the high lands lying to the northwest and south of the section. This coal bearing formation, with its enormous coal beds have been traced over this particular section northward through this township. One or more of these beds have been exposed by the ordinary prospector, to all appearances in each of the various canyons occurring in this township to the south; that the sand stone formation in particular, [lie] contiguous to the coal beds there, outcrop in bluffs and are shown at the surface by their debris, and are to be found positively continuous at the surface from one gulch to another through this section and the adjoining lands
24 north and south; so that it is simply a matter of locating the coal bed at one cropping and tracing it, simply walking on the surface directly around into the adjoining gulch or canyon to another cropping, showing without question that the beds thus exposed in prospecting for mines are continuous. At numerous places in the vicinity, both to the north and the south the coal beds are exposed naturally in gullies and on the slopes of the hills in addition to the exposure of the prospect and the mines. These various coal beds in their numerous exposures, were noted and examined particularly at the time the surveys were made, for the purpose of classifying the coal lands, and in connection with the work the outcrops of the coal and associated rocks were traced and located and measured instrumentally so at all times there is no question as to the proper location. The instrumental surveys locating claims being checked by the location of section lines and section corners in the vicinity of the coal outcrops. Not only was this coal bearing formation with its coal beds traced north and south from Section 32, Township 15. South of range 8 East, along the slopes of the Wasatch Plateau, but they were traced westward toward Huntington Canyon, and then northward and northwestward, so that the formation is exposed with numerous coal prospects entirely around, and then

for miles on all sides of Section 32 in question. At all places there was not at any time any question as to the identity of the formation and the location of the coal beds in the formation. The entire section is entirely surrounded by the outcrop of coal bearing rocks; with the exception of the slight break on the north there is no question about it. In some places in this vicinity where but a small amount of prospecting had been done a few beds of coal were exposed in other places, but the prospecting had been carried on more carefully and coal beds in number greater than those found in Section 32 have been
25 opened in the coal bearing formation. I can specify the names of them. This locality where the prospecting was carried on to the greatest extent is in the northeastern part of Township 16, South of Range 7 east a distance of about three miles southwest of Section 32, Township 15, South of [Rante] 8 east. At this locality I found four coal beds exposed in prospecting, the lowest of these is four feet, a second bed occuring above ten feet and eleven inches; the third bed thirty feet higher in the section, seven feet in thickness, and the fourth bed about a hundred and six feet higher in the section, six feet six inches. Referring to my notes I found occurrences of coal in the immediate vicinity of this section as follows: Three coal beds have been exposed in the adjoining Section, 29, Township 13, South of Range 8 east. The lowest here is exposed in a prospect in the northeast quarter of Section 29. At the base of the canyon the beds are nineteen feet thick and contain two thin partings and divide the two into three branches. Above this is a second coal bed on the north side of the canyon exposing six feet of coal. The third bed, thirty feet higher in the section exposes two feet of coal which would be in the middle part of Miller Creek. The lowest coal bed is exposed also in the south half of Section 17, showing ten feet of clean coal. The higher bed near the center of the east side of Section 18, is four feet, six inches, of coal, and the same bed exposed near the center of the east half of Section 19, shows six feet, six inches of coal. The lowest bed near the southeast corner of Section 20, the same township and range 8 east, exposes nine feet of clean coal. The same bed, near the center of the northeast quarter of section 21, has exposed eleven feet of coal. In the east side of the south east quarter of Section 21 there is nine feet of coal showing a natural exposure. Near the point of the ridge in the southwest quarter of the southwest quarter of Section 22,
26 parts of the lowest and second bed occur in natural exposures, five feet in the first and two feet for the second have been exposed. Further north in township 15, south of

Range 8 east, on the west side of the southwest quarter of Section 4, a lower bed shows five feet six inches of coal in natural exposure. Going southward from Section 32 in question, the lowest coal bed they have been mining for a number of years in Cedar Canyon, near the lines between Sections 8 and 9 in Township 16 South of Range 8 East. The coal here is ten feet thick, and like that in Miller Creek, contains an occasional thin parting of bone. The same bed on the north side of Section 9, Township 15, south of Range 8 east, is five and one-half feet thick. Prospects and other coal beds high in the section here I have noted on the north side of Cedar Canyon in natural exposures, with full thicknesses of coal where exposed. A single natural outcrop of coal was noted in the lowest bed in Fish Canyon, near the north side of the northeast quarter of the northwest quarter of Section 20, Township 15, South of Range 8 East. The exposure here reveals six feet of coal. The coal beds in the coal bearing formation have been prospected extensively in Huntington Canyon, more particularly in Township 16, South of Range 7 east, and in the northeastern part of Township 15, South of Range 7 east. Two coal beds have been prospected near the southeast corner of section 24, Township 16, South of Range 7 east, the upper of the two ranging from ten and one-half to fifteen feet in thickness in the entire three hundred feet in length. The lower bed is six feet, six inches thick and occurs between formations of sandstone. Two coal beds are exposed in the mouth of Trail Canyon. The lower of those is exposed in the northwest quarter of the southwest quarter of Section 23, Township 15, South of Range 7 East. There is seven feet, ten inches of coal between two formations of [stand] stone. We have in the northeast quarter of the northeast quarter of Section 22, Town-
27 ship 16, south of Range 7 East, six feet six inches of clear coal. Two beds of workable coal have been prospected in Tie Canyon, in the northwest quarter of Section 3, Township 16, South of Range 7 East. The lower coal is seven feet, five inches thick. Sixty feet higher in the section is another bed five feet, eight inches, with an eight inch parting, and one foot immediately below the top. Numerous exposures, both natural and artificial, of the same coal beds, are found in Crandall, Mill, Ridley and Meeting House Canyon, in Township 16, south of range 7 east. On the north side of Huntington Canyon the coal beds in these exposures range in thickness from a few feet— The west side would be more correctly speaking, I suppose. These coal beds on these exposures range from a few feet up to sixteen and one half feet high, and found in the same positions in the section as the coal referred to on the opposite side of the canyon in Township 16, South of Range 7 East. Also in Cedar and Mill Creek Canyon some

natural exposures of coal are found in the lowest bed in Sections 3 and 9, Township 15, South of Range 7 East; but only parts of these beds were exposed in the locality showing two or three feet of coal. I believe that describes the occurrences of coal in the vicinity of the lands in question.

From the fact that the coal bed formation, with its coal beds exposed, extending through and around on all sides, with the exceptions of a small part of the northeastern part of the section, that wherever the coal beds have been sought by prospecting, they have invariably been revealed and are shown in practically every canyon in this district on these various sides of the lands in question, and since there are not only one, but a number of beds, there can be no reasonable question of the fact that one or more, and almost undoubtedly all of the beds exposed in this section 32, would extend through a short distance from their outcrop from their exposures through
28 the section in question. Not only that, they would without doubt, one or more of these bodies, extend through the whole area of land here described as surrounded by the outcrops and occurrences of these coals. There is no disturbance in the rocks that would displace those coals from their normal positions in the section, or in the lands adjoining in the vicinity. The entries run northward toward the mines that are being operated in the adjoining corner of Section 29. It is being operated by coal companies now actively in that locality; if it has a name I don't know,—about three quarters of a mile away from the same bed. The coal found in entry No. 1 outcrops again out side of the section in the north fork of Miller Creek as described. It outcrops as shown in the North Fork, and also outcrops and is mined in, or has been mined in Cedar Creek Canyon and near the east line of Section 8, about three and three quarters of a mile south. The same bed has also been opened in prospects in Huntington Canyon as I have stated, about three miles to the southwest. As to what I have said in regard to entry No. 1 being true as to Entry No. 2, Coal, coal beds, essentially in the same position in the section crop out at Huntington Canyon on the Southwest, and they also crop out in the Canyons to the north, but it is now—one is not able to identify the beds as particularly as in the instance of the lower bed, because the lower bed rests on the sand stone formation and are easily identified and traceable throughout the whole district, while the other occurs associated with rocks higher up and is not so easily identified; so you could not say whether exactly the same bed, or whether a bed in practically the same position. The difference between the physical condition down there between the mines that have been opened and worked where coal is fully exposed to the naked eye, and the same coal in the same beds

where work has not been as yet prospected is concealed from the naked eye by the soil. If you strip away the
29 covering the beds would be disclosed, because at numerous places along the outcrop of the formation where the soil has been stripped away by erosion and by the wearing of the streams of water or by slides, the coal is revealed. I have mentioned a number of localities in referring to these exposures where the coal has been removed, but not in Section 32. The depth of the cover in Section 32 above the lower coal would vary from a few feet near the outcrop up to, well, twelve or fifteen hundred feet. I will state here in explanation, that the outcrop of a mass of sand stone formation known in the field as the Castle Gate formation, and traceable there through the Castle Gate District, is shown on the map by the hatched lines. Here the base of that sand stone is about eight hundred feet thick, and I would estimate that probably at the point where the coal is at the greatest depth beneath the surface, is in the southwest corner, or near the southwest corner, and near the middle of the west-side where some spurs stand out to the section, and where probably the larger part of the Castle Gate sand stone is exposed; but for the most part of the section, in a very large part, the coal, the lower coal, is less than eight hundred feet from the surface, and, of course, the higher coal is relatively nearer the surface. The map shows the canyon has a fork and forks in the section. There is a principal form, a number of small ones; two principal branches.

The occurrence of coal in Section 32, Township 15, South of Range 8 east, in the [southern most] fork of Mill Creek, presents simplest form of a mining proposition; that is, the working of the coal from its outcrop, or from its edge. From the coal outcrop down the canyon the grade is comparatively small, approximately ten per cent. The canyon is open and comparatively smooth. It would simply be necessary to draw the coal from its position in the ground, practically horizontal to the surface, and then transport it down grade to the railroad.

30 At the time that the investigations were made a railroad grade had been built from Price up into the central fork of Mill Creek where the mines were being opened in Section 29. At that time the track was being laid out from Price. This was in July 1909. The terminus is about three quarters of a mile from the lands in question, or about two miles down the canyon. I cannot give the value of the coal that is contained in the section as I don't know the wholesale price of coal in that vicinity. Based on the thickness of the coal beds as exposed in the five hundred acres remaining, I would esti-

mate the approximate tonnage at approximately fourteen million tons. On a basis of a profit of ten cents a ton the land would be worth One Million four hundred thousand dollars.

Cross-Examination

By Mr. Ellis:

I am not in the employ of the Government at the present time, and I have not been employed for a month or so. When I was in the employ of the Federal Government in the Geological Survey, I had other duties than the examination of coal lands and reporting thereon. Part of the time I was engaged in geological work without taking any specific or economic branches. It was comparatively a very small portion of my time. Almost entirely during the fifteen years my work has been very largely directed to coal. When I was a student in the different institutions I attended I took the general courses in geology. I did not confine it to the origin and formation of coal. In my study of geology I studied the occurrence of metals and metalliferous veins to a small extent, and also as to coal measures. I know you can trace a metalliferous vein and fissure or crack in the mountains for a number of miles. I haven't sufficient knowledge to say that it is at [rate] and long intervals that you find what is called ore, commercial ore, in the vein. I know from my general study
31 that ore deposits are freaky, but I would not infer from the mere fact that I found a crack or a fissure in the general mass of the mountain at one point, of which, or in which, there would be a mass of merchantable ore, that the entire fissure or crack in the mountain for a number of miles contained merchantable ore of a like character. The same is not true with respect to the occurrence of coal. It is true that in a formation in which coal occurs,—and even though you can trace that formation for forty miles, there are places where no coal appears. That is not true in this field. It is very uncommon in the fields in which I have been that there is not a uniform thickness throughout, but in fields where I have worked it has been extremely uncommon that the beds have been to a certain extent variable. I have never been in charge of coal works, or coal mine operations, and never worked in a coal mine.

I assumed, in arriving at the estimate I gave of fourteen million tons of coal, a uniform thickness of the bed in the entire five hundred acres embraced within my calculation, but that was an estimate. I did not take into consideration any variability in the thickness of the coal, but I did take into consideration that the same bed which is ten feet in this

canyon is nineteen feet three quarters of a mile north and twenty feet three miles south. In order to give an estimate I assume that the three beds in Section 32 were the same throughout the section. I know that the land in Section 14, Township 15, South of range 7 East, is coal land from the fact that the coal formation occurs all around it and in the vicinity, and wherever the coal has been attempted to be exposed it has been exposed. There is no coal exposed that I know of in Section 15. I did not see any coal in Section 16. There is a coal [accurrence] about two miles northwest of Section 14; and it is exposed again about two miles east and two and a half
32 miles a little south and west, and at various places south and east. One of the essential facts controlling me in my deduction that coal underlies the entire Section 32, is that I observed coal exposed four miles west of it in Huntington Canyon. Another element controlling my assumption is that coal occurs about five miles southerly and westerly of Huntington Canyon. The nearest coal exposed outside of Section 32, is about three quarters of a mile to the north. Those facts and numerous occurrences of like character make me conclude that the entire Section from its northerly line to its southerly line is underlaid with coal. There are no other occurrences of coal in Section 32 except as I have stated and as marked upon the map with the crosses. I have not made a careful examination of the entire section. The width of the lowest bed was ten feet four inches. I am speaking of the width horizontally. In the second case there is a horizontal exposure of about fifty feet, and is the second bed. From that and the other facts as stated I concluded that the entire section is underlaid by coal. In the third bed there is an exposure of a little pit which barely exposes coal at all. I have concluded that that bed underlies the entire section from the fact that the same bed or beds in the same position practically are found elsewhere in the district. There are four occurrences of coal in Bear Canyon. I cannot say that the fourth bed underlies this section, as it is not exposed. I am not prepared to say whether the fourth bed in Huntington Canyon, which is four or five miles away continues, or has gone as far as Section 32. Exposure No. 3 is four or [—] miles away, and I conclude it comes there because of the fact that the coal beds in the position of [of] No. 3—I don't pretend to particularly identify each bed over the field, occurs in numerous other places. As a rule only the lower beds have been prospected. I have projected these coal beds a dis-

tance of three miles; I mean three quarters of a mile.
33 There is an exposure of coal in the northwest quarter of Section 32, Township 15, South of Range 7 east. That is one of the smallest facts from which I conclude that coal underlies the section. The exposure of coal is nearer than five and three quarters or six miles to Section 32. From the westerly line of Section 32 there has not been any prospecting that I know of. The nearest actual exposure of coal to Section 32 is three quarters of a mile away, and from that to seven miles away, and further also. The dip of the coal beds in Section 32 is slightly toward the west. I only examined a portion of the country lying between Huntington Canyon and Section 32, only a part of it nearest Huntington Canyon. I examined the lands in Tie Fork Canyon. That is up in Section 34 and 35, Township 15. I found no exposures of coal there. I was above the coal. Between the most westerly line of Section 32 to Huntington Canyon on the west, in Township 15, I made no examination, but I have examined along that line parts of Section 34 as far as Sections 33, 34 and 35 of Township 15. I examined the westerly part of Section 32 and the eastern part of those sections. I am not able to say whether the country has been faulted. I say that the occurrence of coal on the west side of Huntington Canyon matches up with the lowest bed found in Section 32, because it has been traced completely around with the exception of a very small area in the northern part. The northeastern part of Township 15 north of Range 7 east, not only the beds that contain the coal, but the formation of the rocks are also completely exposed around that locality; and also from an examination in Huntington Canyon and up Tie Canyon, there is sufficient conclusive evidence to show that the coal bearing formations have not been [displaces] in this vicinity. I am not able to state the exact difference in elevation between the occurrences of coal on the west side of Huntington Canyon,
and the northwest quarter of Section 32, or the actual
34 occurrences of coal in the northeast or the northwest quarter of Section 32 in controversy. It is approximately the same. The difference in elevation on a 2.3 degree dip between the points mentioned, which is a distance of seven miles and a half, assuming that the dip was continuous, there would be a difference in elevation of eleven hundred feet if carried clear across, but the dips are not the same. I don't think it is necessary for land to actually have coal on it to be known as coal land. If there is a sufficient occurrence of coal on various sides, and numerous other facts to show that the coal formation as a whole, and that many of the coal beds at least, are continuous for a long distance, I assume without

question that those beds will extend three quarters of a mile, especially where the same beds are exposed on various sides of the special area in question. A coal prospect is an artificial exposure of coal, other than a mine. The difference between a prospect and a coal mine, is where there has been continued work and from time to time coal has been removed for use or commercial purposes. If the purpose is simply to expose the coal, and not use it for commercial purposes, why, we speak of it as a prospect to distinguish it from a mine. We use the term "mine" when the coal is removed for use or for sale. A prospect is an artificial exposure of coal for the purpose of exposure alone, and not for the purpose of removing the coal for use or commercial purposes. If after the prospecting is done and development continues and coal is removed for use, it is termed a mine. A prospect is a mine from which the coal has not been, or is not being removed for commercial purposes; and a mine is such a prospect where the coal is sold to somebody. I am not sure that the coal is going to be removed continuously from that locality, and therefore call it a prospect, and not a mine.

I did not notice on any of the three exposures any evidence of the coal feathering out. I do not remember the
35 width of the coal at the face in the second bed. It is not worth while to guess. I cannot say whether there was any work done between my first visit and my last visit in last July. My notes do not enlighten me. As far as I could see it was in practically the same condition in 1909 as it was in June 1906. I did not notice any gradual thinning out toward the face at the farthest point of the exposure. I did not take the dip in the working of the coal exposure there; but I say by my simple observation it was practically horizontal. It was within one or two degrees.

In arriving at the conclusion that a coal occurrence is a workable deposit, I determine the quality and the thickness. I do not have an analysis made of the quality of this coal. I do not know precisely the quality, but know from what I have seen there and the other prospects and mines as noted upon the map, besides that, through Carbon County and further south, and by this very extensive observation I can determine then and form a very close approximation of the quality of the coal, especially in the same bed, and in the same coal field. I have not found the quality of coal varying in the same bed in this field. I did not determine the percentage of iron the coal in Section 32 carried, or what percentage of sulphur, nor its coking qualities, and those were facts which influenced me in classifying the land as coal land. I consid-

ered those factors essential in this case, but I did not analyze them. The coal I know, without an analysis, contains very little, if any, iron, and very little if any sulphur. I know that because a coal bed on weathering shows those characteristics. At these particular openings there are neither iron nor sulphur. I determine that by looking at it. In arriving at the commercial value of the coal, I took into consideration the thickness of the coal, the knowledge of its extent and the relation of the rocks both above and below the coal; also the overburden or rock lying above
20 the coal. Those were the essential features. The limit of overburden, in my judgment, under which you can successfully operate a coal mine is within four thousand feet. I mean by that you can't work coal under a depth of four thousand feet, either going down or going under the mountain. The reason for that is that the crushing of the coal and the coal from which the rooms are held up, the roof is held up, and the comparatively small amount of coal that can be taken out before the pillars are removed, because the greater the overburden the thicker the pillars that are necessary, and the smaller the room in the mining of the coal. In estimating the fourteen million tons in Section 32, I allowed twenty seven cubic feet to the ton, and also four hundred tons to the acre to be left in the ground. I did not take into consideration in classifying the coal land its accessibility to the market. I would consider coal marketable if it were a hundred miles from a railroad. It is marketable where you do not specify time in the growth of the country. When it comes to the grading of the coal lands, and putting values on it, why, of course the accessibility would have a bearing.

There is a massive sand stone on this Section 32, and the same is practically unbroken. It is comparatively close grained. In some parts there was a little conglomerate, as I remember, and occasionally you would find pebbles, but not as a rule. There was bed after bed of continuous sand stone. It was broken only by weathering, as far as could be determined. I would not say it was a good quality for building purposes. I did not look at it with a view to determining whether it was useful or suitable for quarrying or building purposes.

In June 1906 I spent one day in examining Section 32. That is, it was practically one day. On that day we ran an instrumental survey up the canyon along the north side, and around through the section out through the south-
37 eastern part of the township. I established the line in locating the section corners. On that day we followed the line of outcrop until we came to the openings at

the tunnels. We found timber and grass on that section. The bottom of the valley, that is along, you may say, the bottom land of the stream, which was comparatively narrow, contained a comparatively thick growth of aspens, which were up the canyon, as I remember, practically through Section 32, and then beyond toward the heads of the various forks there, —there are three principal ones in Section 32. There was a considerable growth of spruce, and probably some fir,—some little fir, but chiefly spruce, but those were confined to steep spurs at the head of the canyon and on the north sides of the spurs. The best I could judge from the observation I made, the section as a whole, or the area of the section was covered to the extent of one-third to one-half by a forest. The section as a whole is valuable as timber land; and also valuable for grazing purposes. I could not say whether it was valuable for building stone. The sand stone was readily accessible for quarrying or mining purposes, and the timber on the section was accessible for removing and a part of it was accessible for animals. I don't know that such sand stone would make building stone. I could not say if it would even pay for the extraction. Assuming that it is suitable for building purposes the section contains many millions of tons. There is very little timber there that would be suitable for saw timber. It would be classed as lodge poles and ties. If I found a section upon which there was an exposure of commercially profitable coal, and also a very heavy growth of timber suitable for commercial purposes, I would certainly classify that land as coal land, because the value of the coal would greatly surpass anything that was found on the surface. The value of the timber could in no wise approach the value of the coal. That would
38 not be true, however, if there was just ten feet of coal in the section. If I had knowledge that there was a coal bed ten feet thick and its extent in the section was only a hundred feet, of course, it would have very little value. I would certainly classify Section 32 as coal land even if the section were heavily timbered and an exposure of [stand] stone upon it. Nevertheless, the exposure of coal in it would determine my classification. If I had knowledge that the surface material was more valuable than the coal contained in the land I would not classify it as coal land. I do not believe the sand stone in that section is worth anything, because the same sand stone, or sand stones of the same character are coextensive with this coal field, and sand stone known to be of better quality is unlimited in quantity in the vicinity, and practically on a line of transportation, and for that reason I should say that any stone whatever on this section would be of no commercial value. In determining the commercial value of the sand stone and of coal I take into consideration the question of

time, and as to when it would be accessible for transportation. It would be also true as to time. I saw no evidence of any burning of the coal on this section. Where there is burning there is always a change in color, either brighter yellows or brighter reds. The burning in some instances does extent beneath the surface. There is no evidence in Section 32 of any fissuring to any extent, and I saw no indication of any deep seated fissures and no faulting whatever. I estimate that there is a hundred to a hundred and forty acres of the section that is not coal bearing. It is embraced within the various forty acre tracts of the section. In eight separate tracts the occurrence of coal on the different horizons in Section 32 are all workable. There would be three separate entries which could be run in on each bed without interfering with the other, and they could be worked contemporaneously. The first bed is about forty feet vertically as I remember it; from the second to the third bed about ninety feet above the second.

39 Redirect Examination.

The exposure of coal in Section 29 that was being opened for a new mine when the lands were examined in July 1909 is a short distance south of the center of the northwest quarter of Section 29. If the tunnel in Section 32 was extended to the north it would open into the canyon in the immediate vicinity of the new mine opened in the northwest quarter of Section 29, and if the mine on the lowest coal, as located in the corner of the northwest corner of Section 29 was extended southward toward the tunnel opened in the side of the canyon in the north half of the southwest quarter of Section 32 it would connect therewith, since the coal in both mines are from the same bed. It would be practically on a horizontal. If a body of coal workmen were engaged in extracting coal, one starting from the entry on Section 29 and proceeding south, and another body of workmen engaged in extracting coal starting at the entry on Section 32 were proceeding north, they would meet each other, and without any reasonable question there would be a straight tunnel in the coal from one section to the other of about three quarters of a mile in length. If the coal extraction could be continued south of the east side of Section 32 from the north bed it would have an exit in certain mines located in the east side of the southeast quarter of Section 8 in Cedar Creek Canyon where the identical bed is exposed and has been mined; and men working south would meet men working north from Cedar Creek Canyon, and you would have a horizontal plane, a straight tunnel of coal about two and a half miles in length.

Speaking of the quantity in the various exposures and in the mines in these canyons I would say that the bed would not

be less than ten or more than twenty feet; in other words, the coal would range between ten and twenty feet of thickness in that distance, and the exposures of coal would indicate that the quantity is essentially the same as at all of these
40 localities; and coal from Cedar Creek Canyon having been analyzed and in physical properties, the coal is essentially the same, showing it to be a good grade of bituminous coal.

The reason why I think there would be one straight horizontal line of continuous coal in Section 32 to the north three quarters of a mile, and to the south two and three quarters of a mile or two and a half miles, in the first place, in these various coal exposures that have been testified to in Section 32, and in Section 29, Township 15, south of range 8 east, and thence southward into Cedar Creek Canyon in Township 15, south of range 8 east, the crop of the lowest coal as measured by accurate instrumental surveys from one locality to another, showing that the lowest coal in particular occupied a definite horizon and can be easily traced, either by the instrument man or by an ordinary prospector; not only is this coal outcrop or horizon easily traced but associated beds of rock, including other coal beds, have been found in the various localities mentioned, included in this special area in question. So that there can be no reasonable doubt that the bed or beds are continuous through this limited area. At no place had prospecting been attempted on the position of the outcrops of these beds without the coal, in its workable thickness, being revealed.

I was employed by the Government in the main to ascertain questions of fact as to the existence of coal deposits. The characteristics peculiar to the coal deposits were taken into account by me and kept steadily in view. Coal deposits are known to differ entirely and practically in their occurrence, from metalliferous ores. It is true that the coal deposits are generally of a wide extent and of regular formation, the result of slow accumulation at the earth's surface, following
41 the lines of [of] occurrence common with stratified formations, and consequently conforming to the rock of the adjacent strata. Metalliferous ores, so far as my knowledge goes, occur in various kinds of rock, sedimentary as well as others, but they occur in a different manner entirely from that of coal deposits, in that the coal deposits, as you have stated, are sedimentary, and the laws governing the accumulation of those deposits, and their preservation in the earth, are the same with respect to coal as to any other [dedimentary] rocks.

That is, they remain at the present time practically in the position with respect to the adjacent rocks, that they occurred either immediately after or soon after their deposit; while in the case of metalliferous ores, the metalliferous deposits, they are with very few small exceptions, of secondary nature; that is, they occupy fissures and are usually termed veins, or by replacement or in filteration. They occupy spaces formerly held by other kinds of rocks with [filteration] between those rocks, and are at the present time, in a great many instances, in a process of transportation. In other words, accumulating of being removed; so that as a rule the metalliferous deposits are found where subterranean waters are able to pass and displace other rocks and replace minerals, including metals in solution. It is difficult to predict the underground extent of metalliferous ores from the fact that the fissures or spaces in the rock which were occupied by metals, are of a secondary nature, often following the [fractur-s], sheer zones, or ruptures of the rock that may extend in any direction, either with the bed or across the bed on sedimentary deposits, and in any direction through non-sedimentary deposits. Coal beds are sedimentary rock or sedimentary deposits. They are formed practically contemporaneous with the beds that include them. They were formed of particles of vegetable matter deposited in the most instances in water. Such being the case, if the surface rock previously formed is of an uneven char-
42 acter that will not extend above the surface of the water in which the coal deposit is being formed. The coal bed will be laid down upon this uneven surface, varying, it may be, to a certain extent in thickness. In coal beds, as in other sedimentary deposits, they have been, in many instances, formed over wide areas; in other instances, as with other beds of sedimentary rock, they may be of local extent. In certain fields where the rocks are highly tilted and where limited observations may be made in regard to the occurrence and extent, it is often difficult to determine the area of the original coal deposit or of its present occurrence. In this field, however, which includes the lands in question, the rocks have been but slightly tilted. The erosion of the land has gone on for a long period so that the canyons have been cut down through the coal bearing rocks to and through the coal beds, and from those canyons various tributaries extend into the coal lands, in some cases several miles laterally, so that it is an easy matter to determine the present extent of the coal deposits within specified areas. It is recognized that the present outcrop of the coal was at one time under cover, as are the coal deposits at the present time at some distance from the out-

crop. So that from the present numerous outcrops in certain area, for instance, in the vicinity of Section 32, the various exposures of coal serve the same purpose that numerous shafts or drill holes would serve in determining the coal character of this land. If these coal deposits in this vicinity were entirely concealed by superimposed beds and numerous drill holes had been put down at these localities where these openings and prospects and exposures now are, it would be determined by those who were conversant with coal conditions, that the proof is ample showing the extent of the coal beds through the specified area. The evidence of the extent of the coal
43 from the outcrops and from various exposures testified to, are ample to assure any reasonable man that the land in question, besides other lands contiguous, above the occurrence of the coal, contain without any reasonable question such deposits of coal as will warrant exploitation and would lead any investor who desires to invest in coal lands, to extend his means in the purchase of coal land.

Cross-Examination

By Mr. Ellis:

Starting at what I called the crop in Section 36, Township 16, South of Range 7 East, and preceding thence in a southerly direction for a distance of eleven miles you would be in coal for the entire eleven miles. In the immediate vicinity there is no surface indications whatever of the existence of coal, except the actual crops on that line. Following upon that line, you would pass through eight distinct sections of land without any indications whatever, either upon or beneath the surface, of coal and yet, without any reasonable question, it is a positive fact that beneath each and every one of those sections there is coal in a merchantable commercial quantity. I do not say that if they start at the bottom of this section and the top of the other, and one party goes south and the other party north on the same level line, and on what has been called the crop, that they will meet in coal at a distance of twelve miles. I did not say they would meet in coal. I said they would meet on that horizon. I did not mean to say they would be in coal all of the time. There is not only one or two, but several beds. I might say, in explanation of my answer, that if there was just one bed of coal in this region, it might raise some question for that distance as to whether there would be coal all the way: but there cannot be any reasonable question where you have several beds of coal that they would thin out in the same way with one bed. You simply have a
44 preponderance of evidence as to the occurrence of coal. I said yesterday that there was a fourth bed of coal in

this Section. There is a possibility that the fourth bed of coal might cease in its lateral extent before it reached the limit of ten miles. There may be some possibility as to the lowest bed ceasing in its lateral extent to the north. All things are possible as to bed No. 2. Anything is possible about bed No. 3. The extent of this coal north and south is about one hundred miles, and about forty miles east and west from my personal observation. Beds of coal have been found wherever sought through that area. I over-estimated the length of the field. The length of the field so far as my knowledge goes is from Township 6 south to Township 24 south, which would [--] one hundred and twenty miles. I did not over-estimate. I do not say that the lowest exposure of coal shown on Section 32 extends unbroken in a southerly direction for fifty odd miles. I do not know where it ceases in its unbroken condition. In one sense I can say that it does not cease within one mile southerly. As a geological fact I can say from my geological knowledge there is no question in my mind, therefore I say it does not cease within one mile southerly. I say that as a geological expert. If I were a layman investigating this land I would say so, because the evidence is too plain. I don't believe the lower occurrence of coal as shown by the development in Section 32 extends laterally east and west for forty miles. It ceases so far as I know as a workable bed somewhere in the vicinity of not far east of Castle Gate. The formation still exists. The coal formation extends and associated beds of coal are present. It is not true that you can have what is [know-] as a coal formation and have an utter absence of coal. A formation that is utterly absent of coal is not a coal formation. You may have a series of stratified sedimentary deposits continuing for a long distance in the section of the country unbroken, unaltered and unchanged. I have no knowledge that it is a fact in this region in Township 16 south of Range 8 East, that there is an utter absence of coal for long stretches on so-called crops, and then the coal will reappear at intervals. I do not say it is not the fact. I have no knowledge that that ceases at all. The only answer I can make to the question: "Are you able to say that the lateral extent to the west of the lowest bed of coal shown in Section 32, does not cease within a mile to the west of that section, as a fact, and not as a geological hypothesis or conclusion?" is, it depends entirely upon the point of view you take of it as to what a man knows; and if he does not know, if you assume that what a man does not see at the present moment, he does not know, why then, of course, you have another question; but if you admit that a man may know more than that, more than what he

sees at the present time, why, then you have another question. I have seen metalliferous deposits in a coal [ned]. These deposits are formed in the same method that the coal is formed. They got there by being segregated by the circulating waters. I have heard of the original deposition of metalliferous minerals in porphyry, but as a rule they are secondary deposits. It is known, or at least believed, by expert mining engineers, or those proficient in metalliferous deposits that certain metals are original in their occurrence; that is, they were brought out or deposited with the rocks that contain them; but I have not [know-] and I don't know now, at least, of a case reported where such deposits were of commercial value. For instance, I have known of gold being found in chalk deposits—lime stone, and it has been regarded that gold even is found suspended in sea water, or it may be found in extremely small quantities in the various sedimentary rocks, and it is supposed it is an original de-
46 posit, but it is, as a rule extremely small. It is considered that metalliferous ores that occur in appreciable quantities are secondary.

JAMES C. DICK, a witness produced by the complainant, being first duly sworn, testified:

Direct Examination

By Mr. Maynard:

My name is J. C. Dick, aged thirty eight; engineer, Salt Lake City. I received my mining education in Lehigh University, Pennsylvania. I graduated from there as a civil engineer in 1895. Since 1896 I have been connected with mining for about fourteen years. I have worked in the coal fields of Pennsylvania, Kansas, Indian Territory, Arkansas, and the mineral fields of Utah, Colorado, Nevada and Arizona. I was with the Pleasant Valley Coal Company on Clear Creek where I presume I was for six weeks. I am not connected with that company now. I do not recall the year when Utah was admitted into the Union. I had a Government contract to make a survey of the lands in Carbon County. That was eight or nine years ago. I was employed by the Government to sectionize the country. I believe I entered upon the work in 1901. I was engaged in the work about six months. The nature of the work was sub-dividing lines and setting up corners, section corners. After I completed the work of sectionizing I made a report to the Government and the same was filed in the office of the Surveyor General. I received a manual of instructions from the Government which we are supposed to follow in making our surveys. We are asked to report on

the condition of the soil, timber and coal lands. Just how that is worded, I don't know.

The report of James C. Dick as United States Deputy Surveyor, so far as it relates to Township 15, South of Range 8 East, Salt Lake Meridian, was read into the record by Mr. Maynard.

47 Report
of

James C. Dick, United States Deputy Surveyor, of Tp. 15 S. R. 8. E. S. L. M.

General Description.

This township is very rough and mountainous, and is best adapted for grazing purposes, the only tillable land being found along Miller Criik, in south-eastern portion of township.

Timbers suitable for milling purposes is found only in western portion of Tp. and consists of pine and quaking aspens. The remaining portion of the township is covered for the most part with a scattering growth of scrub cedar and pinion pine. Water can be found in Miller Creek and a few springs scattered throughout the township. The tops and north slopes of most of the ridges are covered with an abundance of rich and nutritious grasses which furnish feed for cattle and sheep pastured in this vicinity during the warm summer months.

There are numerous indications of coal deposits throughout the township, and in the following secs. there are sufficient indications to warrant returning the same as coal lands, viz. Secs. 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 28, 29, 30, 32 and 34; the northwest ¼ Sec. 3, and South ½ Sec. 33.

There are no other indications of mineral in the township.

Melvin M. Miller has a ranch in the S. E. ¼ of Sec. 27, upon which he has made about $500.00 worth of improvements in the way of fences, buildings, etc. D. E. 1473.

There are two saw mills and some buildings in NE¼ Sec. 30, but they were unoccupied at the time of survey and owner is unknown.

48 I was unable to find any trace of the following named settlers reported to have Deseret Entry claims in this township, viz. George Wilcox, D. E. 1462; Lewis Whimmpey D. E. 1487, and John L. Price, D. E. 1665.

(Signed) JAMES C. DICK,
U. S. Dep. Surveyor.

May 27, 1900."

I think the date is correct, 1900. I came out here in the fall of 1898. I am pretty positive that is right, because I came out here in 1898, and this was the year following, and I think the map that is in the Surveyor General's office is dated 1901. I find the exact date is May 27th, 1900, when I made the record. A survey of Section 32 was made and completed on that date. The examination of the ground was completed that day. The survey was finished, platted and approved in 1901.

Cross-Examination

By Mr. Ellis:

I can't remember distinctly what was on Section 32. I remember I found timber there from my report. I don't remember distinctly what exposures of coal were found there. That report embodies the sections on which coal was found, or upon which I felt justified in returning it as coal land. It is not necessarily true that I returned as coal land all sections upon which I found natural exposures of coal. To some extent while I did not find an actual exposure of coal, I applied my experience theretofore had and my scientific attainments and determined from a geological standpoint the indications of coal. When I said it had timber suitable for building purposes in that township, I meant to make merchantable lumber. I don't remember the true condition of Section 32, or of any individual section.

Thomas D. Rees, a witness produced by the complainant being first duly sworn, testified.

Direct Examination

By Mr. Maynard:

49 My name is Thomas David Rees; my age is 52 years, my occupation is farming and sheep raising. My place of residence is Wales in Utah, San Pete County. I was once a member of the State Board of Land Commissioners of this state for about nine years. From the time of Statehood, which was in 1896, for the next nine years following. As a member of the State Land Board I was designated to appraise, prior to sale, school sections in this State. I examined Section 32 as shown upon Exhibit A, and I made a report to the Land Board and the report is now of record with the State:

"County No....

Appraisers' Report Carbon County School Fund.

State No.....

..... Utah, ...

To the Hon. State Board of Land Commissioners,
Salt Lake City, Utah:

Gentlemen: We the duly appointed and qualified appraisers for ..... County, Utah, beg leave to report that we have viewed and carefully examined the following described parcels of land, situated in .....County together with improvements thereon. We find their character and correct value to be as follows:

Improvements and Values Thereof.

(No entry under this item.)

Character and Value of Lands.

Description.
Subdivision Sec. Tp. Range.
1. All 32 15S E. Offered Oct. 29 1904. 640.

Character.
(No entry under this item)

50

Appraisement.

No. acres	Value Per acre	Total Value of land,	Value Improvements	Value. [Tim-er.]
640	2.50	1600		
Total 640		1600		

Miscellaneous matters, not included in foregoing report.

A small part of this Section lies in Emery County. I appraise it all in Carbon.

This Sec. is supposed to contain coal. It has some saw timber which has been culled out & sawed over. Grazing.

Recommendations.

(No entry under this item).

State of Utah,
County of.....—ss:

.....of.....Utah, and.....of.....Utah being first duly sworn, each for himself, and not one for the other, says that he is a duly appointed and qualified appraiser for.....County, Utah, in which capacity he himself, in his own proper person, in the presence of his associate appraisers herein named, viewed and carefully examined the above described parcels of land, together with improvements thereon, and that the within and

foregoing description and values are true and correct according to his best knowledge and belief.

THOS. D. REES.

Appraisers.

Subscribed and sworn to before me by the above named....

.....and..... ..this.....day of.....

.....

Signature of officer administering oath.

51 Endorsed on back as follows.

Copy.

State No. 3410 County No. 101.

School Fund.

Carbon County.

Thomas D. Rees,
Appraisers.

Description of land.

Subdivision.	Section	Township	Range.
All	32	15 S	[illegible] E.

Character.

Mr. Grazing.

No. of Acres 640.
Value per Acre.....$2.50
Total value $1600

Value of improvements $.....

Filed Sept. 6, 1904.

Approved Sept. 6, 1904.

BYRON GROO,
Secretary.

Ex. B. J. W. C."

After the examination and filing of the record I personally offered the same for sale at the price in this statement. At the time I made the examination of Section 32, I saw exposures of coal at one of the mines on the section that has been identified by the witness.

Cross-Examination

By Mr. Ellis:

I went out of office in 1905. I think that is the date. I made the examination just prior to the filing of the record which

is marked filed Sept. 6, 1904. I returned the land as grazing land. I stated in the report that the land is supposed to contain coal. I saw the opening, but at the time I was there there was kind of a slide over the face of it, and I could not get into the opening, but there was evidence of coal on the
52 outside showing that coal had been taken out of the opening, That was the only exposure of coal that I saw at that time. I called the land good grazing land. I have been in the farming and sheep raising business for over thirty years. I have never had any experience with coal mines as a miner. I had had experience in observing the coal mines in a casual way like others, for I have been around coal mines, something like that. There are coal mines in my home county, I have seen them in operation as a visitor or layman might observe them. At the time of my examination of Section 32 I came to the conclusion that the section of land was more valuable as a grazing section and for the timber on it, than it was for the coal, and so reported to the Land Board. And pursuant to that report the Board in 1900, through me as one of its members, offered the land for sale, but I don't remember the price. The report shows the appraised price at $2.50 per acre. I did this as a member of the Board of Land Commissioners. From my experience in observing the appearance there and from my observation and experience in coal mining in coal countries and as a [laymen], I was of the opinion that the land was more valuable for the purposes for which it was appraised than it was for mining purposes.

Redirect Examination.

I could not say how long I was on the land. I was there a sufficient time, and tried to get over the section and examine it, and tried as near as I could to get on to every forty, every sub division, but that is almost impossible for a man that has no instrument, and nothing to go by. I was not there more than a part of the day, and had no Instrument. I went up the ravine. I don't remember what most of the vegetation is, found there. I found a good deal of grass on the top. Steep mountain ridges run up from the ravine. If I had known there was a face of coal as I saw it, I would not have regarded it more valuable for the stone and timber on it. I did not see outcroppings of coal all around there. I did see them in the different canyons,
53 but not on that section. We found croppings in the different canyons in there.

Cross-Examination

By Mr. Ellis:

I think I answered that when I made my examination that there was no exposures of coal beds that induced me to believe that was valuable as a coal deposit, or valuable other than as grazing land.

ERASTUS ANDERSON, a witness produced by the complainant being first duly sworn, testified as follows:

Direct Examination

By Mr. Maynard:

My name is Erastus Anderson. I live at Price. That is, I have a home at Price. Also have a ranch some twenty-five miles from Price that I put in most of my time on. That is on the ranch. I have two homes. My age is fifty years. My business is ranching. I have lived at Price twenty years, possibly twenty one. Continuously twenty. My occupation is that of a blacksmith. I have had a shop at Price a good many years, possibly fifteen. I had a saw mill up in the Miller Creek Country. I bought the saw mill in 1889 or 1890. It strikes me it was in 1890, and my brother and I ran that saw mill for something like six years in partnership; then I sold my interest to him. It was what we call the middle fork. It is on Section 19, Township 15, South of Range 8 East. We ran it there about two years and we moved it about here at this fork. It was located on possibly Section 20, and we run there one summer and we then moved up to Section 18, and we run there one summer. That is Section 17. In the same township and range. Then we moved out there and from that point back into Section 29, and that is where I sold out my interest. Section 29 is just north of Section 32. That is the way it looks to me here. That is the way the country would look to me if I was there guessing at it. My brother and I run the saw
54 mill at the point you have indicated during the summer time. I was living in Price, and hauled lumber to Price. In the winter time I was engaged in the practice of blacksmithing. I know of a mine of coal. I know the south Fork on Section 32 of Miller Creek in Section 32. South Fork seems to be a late name with me. We used to simply call it the left hand fork of Miller Creek. I have heard of the Wilson mine. It is located on Section 32. I don't know just whereabouts on the section. I think it is along near there some [whear], near the northwest part of the section. I knew the man Wilson for whom the mine was named. We called him Hy. Wilson. I first knew of the existence of this mine of coal, known as the Wilson mine, along in the early

1890's, possibly 1892, but to make it safe would say 1893. That is when I first saw it myself. When Wilson would come to town for supplies he would bring me a small load of coal, and I would use it in my blacksmith shop. He did that before I ever saw the mine. I don't remember the year. He was there several years. The earliest year that he brought me coal from the mine was 1891 or 1892, not later than 1892, and it might have been before. I was on this ground last spring, April, I believe. When I was up on that fork running a saw mill I went to that section once. That was in 1892 or 1893. I went through that canyon driving some horses the first time I ever saw the mine or the coal vein, and camped there. That was right at the time. There was a little cabin there. I camped in the cabin, and saw the mine or prospect, we called it then. Only for curiosity did I go to the entry for the purpose of getting coal for my camp fire to see how it would burn. There was plenty of wood there and we used that. I got coal from the mine and used it. I do not know how far the entry had been run at that time. It was in far enough so that it was dark at the extreme end. I went to the face. I don't remember how far the face was from the opening. My best judgment is it was
55 fifty or one hundred feet, something in that neighborhood. I don't remember and could not say as to that. I did not pay much attention to that part of it. The cabin was within a few rods of the mouth of the entry, the directions being, I would say, southwest, possibly four or five rods, maybe a rod or two more or less. It was not far. A man was with me by the name of Oviatt. I think he is here. There are two brothers, I don't know which. I don't know whether it is Delbert or Beeman Oviatt. It was one of those boys who was with me.

Cross-Examination

By Mr. Ellis:

The cabin was not there when I was there last winter. To all appearances it looked like it had rotted and fallen down. The foundation, I think, was there. Possibly it had burned up. I identified this coal as being on Section 32 from the fact that I was at this Section corner in April. I don't remember now how it was marked. It is marked six,—no, I could not tell you that now. That is the only corner I saw. From that section corner I concluded I was on Section 32. I don't think the person who was with me was a Government official. I don't remember the man's name. I went up there last week through the request of a party. I don't know their names. I have forgotten their names. They wanted me to go up there and identify the coal,—the old Wilson diggings, as we called

it. My understanding was this: that I went there for the purpose of testifying as to whether it was the coal I saw in the early 1900's, and that it was the same vein that I saw now. I was told that if I were able to refresh my recollection by my visit in April of last year and could go there and testify that on Section 32 there was an exposure of coal at the time the Enabling act was passed granting certain lands to the State of Utah, that the State would be relieved of that land, or its assignee. I did not know what I was going there for, any more than to identify the diggings. They wanted me to identify it. I suppose that was their object, to be able to
56 testify from my recollection of that on Section 32, the school section granted to the State of Utah by the Federal Government, that there was coal there at the time the State of Utah was granted that section, and hence could not acquire it or hold it.

I am a citizen of the State of Utah. I never saw that section but once prior to April 1909. That was not later than 1893, possibly it was 1892, I am certain it was not later than 1894, because it was shortly after I bought that saw mill. I operated the saw mill six years, something in that neighborhood in the Miller Creek section until 1896. I am positive it was shortly after I bought the mill that I saw the coal. It is possible that it was not more than a year after I bought the mill. It may have been later than 1891, but I am safe in saying that it was not later than 1893. That is the only place I remember noticing coal exposed. I was up there driving horses. I noticed the coal along toward the evening. It was evening when we got there. I had no special reason to observe it any more than to see if it would burn. I called it a coal prospect. I did not call it a coal mine. It was not very much developed. There was no mine, but simply a coal prospect. There was quite a lot of timber on that section, and there was first rate grazing. I have not based my conclusion on the valuation of it as to whether or not it was more valuable for grazing and timber purposes than for mining coal. In my judgment I would say it is more valuable for coal than for anything else. I don't know what my judgment was at that time. I had no occasion to pass any judgment on it. It was good grazing land, and there was some timber there. There was a good face of coal in April 1909. There was at least eight feet of coal uncovered. I did not measure it, but a man could stand upright and then have considerable to
57 spare. I know for blacksmith purposes it is a good quality of coal. I don't know where Mr. Wilson is. I have not heard of him since he left there. I heard he went

to San Pete,—to Mount Pleasant, that is all I know about him, and all I know about the coal Wilson hauled me is what he told me. I know it did not come from Section 29 because we had the vein opened up in Section 29. We opened a vein ourselves. That was the only vein opened up then, and it was after Wilson hauled me the coal. I know we opened up a vein on Section 17 when we had our mill up there. That was after Mr. Wilon hausled me some coal. It was opened up by us in 1894 or 1895. It was after we opened up coal in Section 17 that we opened up coal in Section 29, and prior to that time there was no coal exposed there, on either of them. That is Section 19, Township 15, South of Range 8 East. When I say "we" I mean myself and my brother. I cannot say whether there was any coal exposed in Section 22 or 21 at that time. I was not around those canyons that far up. In that section of the country it is all ledges and rocks in there and practically barren. I did not see any coal there, not on that ground. I don't think I have ever been on the ground. I don't know whether there was any coal exposed on Sections 4 and 9 at that time. The main road coming from Price is up Miller Creek. I did not go further south in my business operations than Section 32. I don't know what exposures there were to the south. I don't know what part of Section 32 the coal exposures [was] on definitely. I cannot give each 40 tract it was on. All I know about that is I saw three. I took it, that same vein opened up in two or three places uncovered on Section 32. That was last April. Prior to Statehood there was only one opening that I saw then, and I don't remember on what 40 acre that was. The balance of the section had no coal on it that I know of. I didn't see any anyway. I was aproached and asked to go to this ground at Price by someone as I understood representing the Government in this case.

Redirect Examination.

58 When my brother and I were operating the mill up there we opened up and exposed coal on Sections 17 and 29. I don't know how much work we did. We done quite a lot. We dug what coal we needed to fire our engine with while we were operating there, and it was so near that we fired the engine entirely with the coal after we got it uncovered. We used possibly fifteen hundred pounds a day. My recollection was that the vein on Section 29 was in the neighborhood of six feet. I don't know how far we went into it, but far enough so that we had to use candles when we were digging. It was about six feet wide. We went in sixty or seventy feet, I think. It dipped a little to the southeast, I think; that is my recollection of it. It is on the south side

of the canyon. I don't know how far that would be from the north line of Section 32. The north line of Section 32, I take it, is right on top of that ridge, a big high ridge there that divides the two forks. It is across the hill. I don't know how far it would be if you were going on an air line. It might be a mile, and it [—] be a mile and a half.

Cross-Examination.

I have no recollection as to how many tons of coal Mr. Wilson hauled to me. I could not give my best judgment or recollection about it from the fact that it was only occasionally that he would bring me coal. He would haul me as much as one ton at once in a load. He hauled it more than once; but I don't think he hauled it ten times. I don't think I got ten loads from him. He hauled me between one and ten tons. He hauled a ton to the load, sometimes, I don't think he hauled a ton to the load all the time. He would simply guess at what he had on his wagon. He probably hauled four or five or six tons of coal.

William B. Williams, a witness produced by the complainant, being first duly sworn, testified:

59 Direct Examination

By Mr. Maynard:

My name is William B. Williams, aged 41, I reside at Miller Creek at present. Am a plumber by occupation. I have been on Miller Creek since last August. I moved into Price, or that vicinity in 1885. We moved from Schofield down there into Cleveland, Emery County. At Schofleid we fere working in a mine digging coal. I think it was for a man by the name of Williams at that time. He had a lease on a property from the Pleasant Valley Coal Company. I do not know who he was, all I know is he was a Williams. He was doing development work there, shipping coal out. I worked for him as a miner. I don't remember how long I worked there I was going back and forth for about fourteen years to Schofield to work. In 1885 I moved to Cleveland. My father took a homestead there, and a part of the time I worked on the homestead. I went back and forth between the homestead and the mine on horseback over the range. I know where the left hand fork of Miller Creek is, and so far as knowing about the sections or anything of that kind, I don't know anything about it. I have known of it since 1885 going backwards and forwards there. The first time I ever came across the existence of any coal I was hunting a bunch of cattle there, and as I got there at the time there was a sort of a land slide

just after a storm just as we was going to cross the hill on horseback, and I came in sight of the coal from the road, and when I got back to Schofield I saw Mr. W. G. Sharp and told him about what I had seen, and he asked me if it was coking coal, and if I would go over and get him some of the coal. I asked him if he would pay me wages to go over and he told me he would, so I took a horse and went over there, took sacks with me, and at the time they were testing this coal at Winter Quarters, and that is how I come to take any of it over to him. I went over and got it. I took it from the left hand fork of Miller Creek. I took it out of there I think it was in 1887,
60 or 1888. It was at the time W. G. Sharp took the superintendency of the P. V. Coal Co. I know where the Wilson mine is. I took some out of the very ground that was supposed to be the Wilson mine. I took it out of other places besides in the left hand form of Miller Creek Canyon. There was no opening there, we opened it ourselves. We opened it and sold coal to the Cleveland people at the time, me and my brother. His name is John T. Williams. It was a natural exposure. The coal company was taking up coal land over there everywhere, and I thought I could sell it to them at sometime. It was a natural exposure. I saw coal in what is known as the Wilson mine. I could not tell how wide the face was, only that it was washed off with water. Water had washed off the face of the coal. I saw coal exposed. My brother never saw it until years afterwards. We must have run in on the entry fifty or seventy feet. The face was between five and six feet [think.] The vein we opened up which was called the Wilson mine. We engaged in the business of furnishing the Cleveland people with coal. We did not engage in that business very long, because there was not very many there to sell coal to. We worked it for about two summers or two falls. I could not possibly tell the years, because I never kept track or anythink like that. It must have been fourteen or fifteen years ago when we sold the last coal out of it. That is about as near as I can tell about it, between fourteen and fifteen years ago. I said I took coal from this mine in 1887 or 1888 over to Mr. Sharp. I took about ten or twelve sacks. I had to pack it on horseback over the range. I do not know whether it coked or not. We did nothing about taking coal out after that for a few years, and then went up and opened up the vein of coal in order to sell coal down at our town. I saw other veins of coal there right above the other one; four veins in sight. I only uncovered one. It was up at the head of the left hand fork of Miller Creek. Only just uncovered it so as to see if

there was coal there, because I thought Sharp was going
61 to take more ground in there at the time, and I was taking this coal out for him. He told me to find out how many veins there were in there. I discovered four well developed veins. As near as I can remember I think they were running kind of southwesterly. One was on the right hand side of the canyon and the other three were on the left. I know where the Concolidated mine is now. There is one in one canyon and the other one is in the other canyon. That is the one where the Consolidated is working at the present time, and they are running to the south to meet the veins on the other canyon. They have got two openings there. When I say the other canyon I mean the left hand fork. The middle fork is where the Concolidated Fuel is today opening two mines there. One on the north side of the canyon and one on the south side. The one on the south side of the canyon is where they have developed mostly now, taking coal out of, and that runs toward the south fork, as we used to call it.

Cross-Examination.

We run the entry seventy five feet on the five foot six or six foot vein. We run between fifty and seventy-five feet. It was the lowest vein to our estimation. There were three other well defined veins above it, making four altogether. One of the other veins as I measured it was about eighteen feet, the second vein. I could not tell you exactly the height of them, because I never kept track. Good big veins to my estimation now, pretty fair sized veins of coal, but I never kept track of them or anything like that. The three was on the north and one on the south side. The left hand fork of Miller Creek. I could not tell anything at all about the section, because I never knew they had sections in there then. The land slide exposed one vein of coal, and I afterwards went up there and found four veins. My brother and I went up six or seven years afterwards. It was somewhere along in 1894 or 1895. It was in 1894 or 1895 that we ran the entry between fifty and seventy five feet. I did not develope it any in 1888. I
62 took about twelve sacks down to Mr. Sharp because I thought he might buy the coal land of me. We did not sell all the coal that we took out in driving the entry from fifty to seventy five feet. It was surface stained coal, part of it, and it was not marketable and we could not sell it. We operated it about two falls. We didn't work it continuously. Just went up and got our own coal for ourselves and then sold a little besides to the other people that wanted it. I could not tell how far we had to haul it. It must be fifteen or eighteen miles anyway, as near as I can judge it. There was no other

coal exposed there anywhere in that neighborhood. One vein was exposed by the land slide. The other three was naturally exposed before ever I went into the country, the one that I seen that I developed there. I saw it exposed first at the time of this land slide right after a st[illegible]. The other three are distinct and plain so you can see them. I am not saying that the four, are one above the other. There is one in one place there, the last vein of coal in that district is above and on the left hand side about three miles away from the other; the other three are distinct veins, one above the other, right one above the other for you see them in the left hand fork. There were four distinct veins of coal. I came out of the middle fork on the 8th day of this month. I am working now for the consolidated Fuel Company as a steam fitter and pipe fitter. They dip to the southwest, the veins I saw, as near as I can judge. I ran an entry in there from fifty to seventy five feet in 1894 or 1895. I cannot say which way the one we worked dipped. I am not a surveyor and cannot keep track of that. I was digging coal and selling it. There was an old cabin in there that at one time belonged to Miller Brothers. It was quite a ways away from the entry that we made. I guess about four and one half miles from where we saw the coal. I never saw a cabin near the entry on this lowest coal bed. There was
63 no cabin within a few yards of the entry which I made in 1894, or up there in that vicinity.

Redirect Examination.

I have seen the beds of coal at the Consolidated mine. I think they have got three opened up there now. I have been inside of them. I do not know the quantity of the coal. I think the one they are operating on now at the present time must be eighteen feet wide. Of course, they are only taking about seven or eight feet out of it now. The railroad track has not been completed up to this mine, but the incline, they call it, up where they drop down the tram cars to the lower tipple where they dump the coal out there is a railroad from Price up to the Tipple. The coal there outcrops in the south fork looks to me to be the same vein from both sides that they are operating, As a practical miner I have no doubt at all the vein that I saw in 1888 and that I took the coal from to show Mr. W. G. Sharp was about five feet six inches or six feet; the height of the coal at that time.

JOHN T. WILLIAMS, a witness produced by the complainant being first duly sworn, testified:

My full name if John T. Williams, my residence at present is at Schofield, Utah, I am forty seven years of age next May.

My occupation is that of practical coal miner. I have worked as a coal miner in Southern Wales before I came to this country since I was twelve years of age up to the present time since last November most all of the time. I came out here twenty-five years last September. I worked about ten years in Wales as a miner. Some of the mines I worked in were in as far as a mile and a half. In depth about seven hundred or eight hundred feet. When I came to Utah I went directly to Schofield and worked in the mines there. I am a brother of the last witness. I remember going with my father and taking up some land in Cleveland. Worked part of the year on the farm and part of the time as a miner in
64 Schofield. I know of the occurrence of coal in the Miller Creek country. I cannot positively give you the date when I first knew of it. I know it was before Statehood time, but didn't keep track of it because I didn't think there would be no call again for it. I know it was before Statehood because I know I was up in Schofield at the time we celebrated it. When we first worked there we drove about ten feet, and I quit at that time and went back to Schofield for the winter. Another time I went down and drove her in a distance of about thirty or thirty-five feet further. It is supposed to be what they called the old Wilson mine now, I understand, that is what I took it for. Well, I will tell you one point on it and you can take it whether it is the Wilson mine or [no-]; that is the furtherest mine that is in that canyon today, sir, and that was the place I took the coal out there. I don't know which you call the Wilson mine. I know the old gentleman Wilson. He came for me and my brother to open up that vein for him. It was the brother who was on the stand. I uncovered it from the grass roots; that is the furtherest one in at the present time. It was in the left hand fork of Miller Creek. I worked there part of two falls, and as I told you, I drove her in about thirty or thirty five feet. I didn't know that it had been sectionized at that, and nothing about it. I know where the Consolidated mine is, the present Consolidated mine. The one I worked in then was in the middle fork they call it, and the other is in the left hand fork. I think it would be south of it, because it is in the left hand fork just over the hill.

Cross-Examination.

I opened on the coal in the left hand fork on Miller Creek for Mr. Wilson one mine and two other openings in that other. I was employed by him to that work. My brother assisted me in doing the work, and another brother that is now buried. I can't give you the date of that, but I know it was before State-

hood time; but whatever time Statehood was about
65 1894 or 1895, was it not. I cannot give you that. I know it was two or three years anyway, because it was on different occasions that I worked there, two different falls. I was there in the fall before Statehood. I am not sure that was the last fall I worked there. I only worked there two falls. I worked the preceding fall before Statehood at the request of Mr. Hyrum Wilson. We sold a little coal from that one and the balance we threw over the dump because it was stained coal, and I did not claim it to be marketable, because up in Schofield I know Bishop Williams had mines of this same coal and he could never sell it. I don't remember whether I got the money from selling the coal, or whether some of my parents got it. Mr. Wilson sold to some people down in Price and got the money for it. I never got any money from it to my knowledge from the coal.

I heard my brother's testimony. I was not paid by Mr. Wilson. Wilson hired me, but I don't know that he ever paid me at all. He never paid me anyhow. I was hired by him to open it. He owes me and if I can get a hold of him there will be something doing. The last time I heard of him he was down in Old Mexico. I heard from him at the time of the Schofield explosion. His daughter wrote up to us then to see if some of his people had been killed in the Schofield explosion.

I remember my brother took coal over there, but where I can't positively tell you, I was not there at the time. I know coal came from this country somewhere; that is Carbon county. I don't know today where Section 32 is. I don't know whether the coal I mined came from Section 32 or Section 1. When I went up there I had seen another opening. It was opened on the same vein I opened, and there was an entry six feet by six there opened and timbered. That is all I know. I didn't go to hunt up any vein. I went to open that coal. That was years before Statehood. I could not tell you if it was four or five years before Statehood. It might have been that much. At that time I found another opening, or an-
66 other vein or an opening on the same vein, and one entry on another vein. The opening I found there was an opening up higher on the same vein, I think some six to ten feet. We didn't open that. It was in the same vein and the same height as the one I opened. I saw one six feet six. I didn't see three or four veins. I just saw two openings. I saw one opening on one vein, and one on another different vein. One was six feet six, and the other about five feet six. I know that because I could not stand in it, I had to bend over in it. I saw another opening about six feet long on the same vein that I made the opening on, and you are to understand

me that I saw another vein. The other vein was not very far away, it was a little higher up the canyon maybe a few hundred yards. It was caved in there. I can't tell you [what] the height or thickness of that cap rock on the top of the five foot vein is the bottom for the other. My brother and I worked the five foot six vein. The lowest vein at that time. The exposure there that I saw was about six feet thick. It was what we called the saw mill vein in the middle fork. I did not see a vein at that time there eighteen feet thick. I seen one there three years ago maybe a couple of years ago, and it had been opened before that, as I understood. I passed during the day. You are to understand from my testimony that I saw two veins, and that is all I did see. That was a number of years before Statehood. Going up the canyon that would be on the north side. I didn't see any on the south side. The dip of the vein would be north, I guess. I didn't see any vein dipping to the southwest there. I don't know what Sections they were on. I know it was in the left hand fork of Miller Creek, the vein I opened. There was a cabin there that Mr. Hugh Nelson lived in at that time, a few yards, or a little west from the mouth of the tunnel opening. That was when we opened the mine. We didn't occupy the cabin. We were further down to the east of the old cabin that Hugh used to run when he run a dairy there. I don't think it is as far as three and a
67 half miles below. I guess a mile and a half or something like that, down pretty near the bottom of the canyon. I don't think the cabin was there two years ago when I was up there. It had been taken away. The cabin by the entry that was taken away from there years ago. I could not say how many I never saw it taken away. It had disappeared when I was there.

I uncovered that coal from the grass roots in that mine. It was the lowest bed at that time. There had been one vein higher up. The little hole about six or seven feet deep was on the same vein as the one I uncovered. This six foot vein, —this six foot six inch vein had been worked. That was another vein. It was timbered at that time. I guess it would be somewhere about twenty to thirty feet of an entrance and had a few timbers in there. It is in the upper vein. Coal had been thrown over the dump. Soft coal, and that was there in existence when I started the entry on the bottom vein. I don't know how long it had been there for the reason I opened the other one, but I seen it was five or six feet above it. I know it was there before I left. The work didn't look very old. The timber was standing up. It might have been a year or two, because it was not timbered very good; probably had not been any experienced timberman to timber it up, because I know it didn't last long before it caved in. I did all my work

a number of years before Statehood, and this work was done before I went there.

Redirect Examination.

I have no idea who did that timbering. I understood it was John Robbins opened this vein, that is all I could say. That was what was told me, is all I know about it.

Recross Examination.

Mr. Richardson presented me with a subpoena, and Mr. Wade talked to me before I was subpoenaed. He told me he was in the employ of the Government, that he was around collecting information about coal lands, getting testimony in these coal land cases.

68 I think it might be a year ago last September when he talked to me about it after we closed down in August up there; either September or November, somewhere along there. No one has talked to me since that time until I came here.

HENRY HERMAN OVIATT a witness produced by the complainant, being first duly sworn, testified:

My name is Henry Herman Oviatt. I was born the 17th of June 1832. I live at Cleveland, Emery County. Farming is what I work at. The village is between fifteen and twenty miles from Miller Creek. I don't know the distance, only that is just what I call it. I moved to Cleveland in the spring of 1885. I have lived there continuously ever since. I will take that back, our water bothered us two or three years and I moved up into Huntington until we got our canals so we could get water down. I think something about two years, but I was working there all the time. We had to live in Huntington on account of our water and have been there ever since. I have been in the Miller Creek country a good many times since I moved to Cleveland. I went there after timber to build up my place in Cleveland for poles and logs both, to build houses and [coralls] and things like that. I went there first in the fall of 1884. I recall the fact that there are several forks there. I know where what is known as the east fork of Miller Creek Canyon is. I don't know anything about the east fork in relation to the occurrence of coal. I have not been up there. I have been up all the rest of them. I have been up the south fork. I know there is coal there, because I went up and got about 3000 myself and hauled it out home to burn it in the house. I cannot tell you the exact year, as I never kept track of any dates. It was somewhere I think in 1890, but I wouldn't say what year it was exactly.

That was not the first time I went up there, and it was not the first time I had seen coal there. I had seen croppings of coal several years before that. That was the first time
69 I remember of getting any coal out of there. I could not say the year when I first saw the croppings of coal there. There were some men getting out ties and they built their cabins right above what is called the Wilson mine. They built three cabins and lived there all winter and had their families there and they dug into the coal mine, just above what they called the Wilson mine. I never was in that mine, I don't know anything about it only going up by there and seeing where they dug into the hill. I never went into it. When I say I didn't go into it, I refer to the Burgess mine. I think that is the man that opened it up there. I knew Mr. Burgess. I don't know where he is now. He used to live at Price. His full name was Elmer Burgess. I think there were two or three fellows lived there all summer. I do not know the names of the other party. I was not acquainted with them. The three cabins were a little above the Wilson mine, scattered along I should say about one hundred yards along about fifty yards apart, the three. The lower one, I should judge, was about a hundred yards from the Wilson mine. I could not tell you the year I was up there. It must have been three or four years after 1885. I did not see the Wilson mine at that time. I saw it a while afterwards, though. It was about a year or two after that I should say. The occasion of my seeing the Wilson mine was when I went up there after timber. I saw where they had dug out coal the first time, then; of course, I heard there was coal, and I went up to where these Williams boys was digging, and they dug me I guess three thousand [—] of coal and I hauled it home and used it there. I went into the entry clear to the end of it. It had been opened up, I should judge, seventy five feet or such a matter when I was there. I have never had any experience in coal mining myself. I was going to say I never dug a [poind] in my life, but I dug a sack full once, that is all. I am pretty near six feet tall and I could not stand straight up in the entry, I had to stoop down to get in.
70 That is all I know about it. I never measured it. The coal I got from there burned good, both on the forge and in the stove. I don't know how far away the other openings or coal beds were that had been opened up by Burgess on this Wilson mine. I could only guess about it. I come along there and seen the mine and then come on down. I may have been up there a couple of years before I seen this last one that was opened up. I should judge it must be about two hundred yards. I did not go into this upper one. I was

driving my team right along there, got timber up there and I drove not far from it.

Cross-Examination

I was seventy seven my last birthday. I am in my seventy eighth year. Have never engaged in the business of coal mining. I have always worked on a farm, except a little, sometimes I work in the blacksmith shop. I resided in Huntington before I went to Cleveland. I moved to Huntington in the fall of 1884, and went to Cleveland the next summer in 1885. I live in San Pete; have been doing farming there.

I saw three cabins on what was called the south fork of Miller Creek Canyon, I guess you call it the South fork, I always called it the left hand fork. I could not say what year that was, or anything about it. I think it was somewhere in the 1890's, but I would not say exactly when it was I know it was after I moved into Cleveland. Might have been four and it might have been five years, I would not say. I don't think it was seven or eight. I have not been up the canyon for timber in the last thirteen or fourteen years. That is in that canyon; I do in the middle canyon, about a year ago I got a load of coal there. I don't [-hink] I have been up the other canyon for fourteen or fifteen years. I don't know how far the entry was run where Burgess was operating. I don't think it was any more than about thirty feet or such a matter.

I said there were three families living in the cabins getting out ties, and while they were getting out ties they dug
71 a hole into this coal mine. That was in the south fork. In the left hand form. The three cabins were about a hundred yards from the Wilson mine. That is, the nearest one was. The Wilson mine was about two or three hundred yards from what was known as the Burges mine. The entry in the Wilson mine was not high enough for me to stand straight up, and I had to lean over and went clear to the end of it. I do not know where Section 32 was. There were no section lines there when I was there. I do not know how many beds of coal there was at the Burgess mine. All I know about it is just these two, the Wilson mine and the other one Burgess had opened. They were about two hundred yards apart.

Redirect Examination.

I moved to Cleveland in 1885 and the next day after I moved there I commenced to build a house. I lived in the town until I got the house built. I got logs for the house up this Miller Creek Canyon. We got the logs out in 1884 and built the house in the spring of 1885. I did not discover the coal in

1884 when I went up to get the logs out. I got logs from both canyons. I got most of them out of the middle [form]. I seen coal in the middle fork, but this other one was the first one I saw. I discoered coal in the middle [form]. That was about just below were they are digging now. It was on the north side of the canyon. We did not open it up nor nobody else opened it up, we just seen croppings of coal. I don't know the size or anything about it. That is where the Consolidated mine is now. The consolidated mine is a little higher up the canyon. A little below. When I first went to Cleveland my son and me built the house together. Then I built another house afterwards, and the corral. I don't know exactly how many years it was before I built the corral. I should think about three or four years after the second house was built. No, it was the first house, three or four years afterwards, we built the corral. It was when we were getting logs for
72 the corral that I saw the coal. That would be about 1889, something like that.

Cross-Examination.

The coal that I saw, whenever it was, in that canyon, was coal that they are now digging on. That is, I suppose it was. I am not positive about it. I went up in that canyon a number of times for poles. I was up there five or six times, Two or three times a year to get out poles and timber to build up a place there, It was on one of these visits that I saw the veins of coal there. I don't think it is the same vein they are working now that I saw the coal in. I think they are a little above the one I first seen about a hundred yards above. It was very close to where they are digging coal now.

Redirect Examination.

I refer to the coal in the middle fork, and didn't intend to refer to the coal in the left hand fork. I don't know of coal being taken from any of the exposures in the left hand fork at the present time, or any time. There was—when I was up the first three or four years I never seen any coal in the left hand fork or south fork as you call it. The coal occurrence that I referred to at the time of the redirect examination was in the left hand fork of the canyon. That is where I told you them cabins were.

Cross-Examination.

I guessed at it that the Burgess mine was about two hundred yards from the Wilson mine. I never saw any coal in the left hand fork at all. I think Burgess opened the first mine there. There was not much difference between him and

the Wilson mine being opened. I never saw any until I saw that. Of course, I saw black streaks in the ground and knew there was coal there, but I didn't dig into them. I didn't see anybody doing any work there at all a number of years after my visit up there for poles. I think it was probably
73 six years after my visit up there for poles. Something like that as near as I can guess it since my first visit there. I think it was in close proximately to where Mr. Burgess was doing some mining.

ANDREW DELBERT OVIATT, a witness produced by the complainant, being first duly sworn, testified:

My name is Andrew Delbert Oviatt; fifty years old, live at Cleveland, Utah, Farming. I moved there in 1885 and then I left there and I guess I was gone pretty near two years. My father was the old gentleman who just left the stand. I lived there with him. I did not have my family there the first year. It was in Huntington. In 1885 I was married. I went there about that time with my father. I didn't take my own family with me. I went there to build a home. I moved to Cleveland the next year. That would be 1886. My business is farming. I was away in 1887 and 1888. I went to San Pete. I worked there one summer, but retained my home in Cleveland. First went up in Miller Creek country in 1884. I went there for timber and hauled out a set of house logs. I am familiar with the different forks. I have frequently visited the Miller Creek country since. I don't think I have missed more than a year but what I have been up there since in going up there principally for timber. Well, I had a few head of cattle and had been running them up in the Miller Creek. I know the different forks. I know the fork in which the Consolidated mine is now operating. I knew the location of what is known as the Wilson mine. It is in the left hand fork. I first saw the occurrence of coal at that point, I cannot just remember, it was somewhere about 1890 or 1891. The occasion of my seeing it was them there fellows was in there getting out ties when I was up there. I saw the cabins my father referred to. They were located substantially as he testified. My brother lived in one of them after them fellows left, one summer, about 1889 and 1890. I didn't see the open-
ing of the Wilson mine. The other mine above I just
74 saw a few holes up there is all as we were going along the road. I didn't go into it. I saw the Wilson mine a year or two afterwards. I have no way of fixing definitely the year. I went to the Wilson mine because I hauled several loads of coal from there. The entry was in about fifty feet at

that time. The Williams brothers were digging at the time. We all hauled part of the coal. Of course, I hauled coal afterwards. They were the Williams who testified this morning. I hauled probably four or five loads. Took it to my home at Cleveland. Some of my neighbors did the same. Most of them burned wood. Some of them got coal from Huntington Canyon. There was no Settlement of Cleveland when I moved there in 1884. My house was the beginning of the settlement at Cleveland. At the time I was hauling coal Cleveland was quite a small place, probably forty or fifty houses. There was a store there. The supply of coal there came from this mine or from Huntington Canyon.

Cross-Examination.

My best recollection is that the first time I saw coal there was in 1890 or 1891, and that was what we called the Burgess mine. I saw what is called the Wilson mine a year or two later. It may have been two years. I don't think it was over that. You can see a streak of coal right along the side of the road. It is exposed for quite a long distance. You could see it without going into where it was. You could see an exposure of coal for a number of hundred feet by riding over. You could not see it by going along the road, because there was too much brush. You could only see the Burgess mine for a little ways. You could see it ten feet I think. Don't think you could see it fifty feet. I never measured how far you could see it exposed. I don't know anything about it, but I could follow it, you know, for five hundred feet by this dark ground, I suppose it was coal. You could see the coal.
75 It was similar material to that which I afterwards saw taken out of the entry. That was not the Wilson mine, that was the Burgess mine. The Wilson mine was about two hundred yards from the Burgess mine. There was not much of a natural exposure of coal at the Wilson mine. When you got up to the face of it you could see it for twenty or thirty feet. I don't think there was more than one exposure. I think the Wilson vein was the only one. I may have seen a vein higher up the hill, but I would not say. Just riding over the hill you could find natural exposures at different places all along the side of the hill. I would not say how far you would have to ride along before you would find another natural exposure of coal on the same vein from the Wilson mine. I never took notice more than riding over the country. I remember the Burgess vein because you cross it going up the side of the hill driving cattle, and the other vein was not exposed so that you could see it only where they had opened it. I don't think that the Bugess and Wilson mines are on the same coal formation. One was above the other.

The Burgess was higher up. They were about two hundred yards apart. The Burgess mine was on the right hand side of the canyon as you go up. That would be west as you were going up. Yes, going west from the north side of the canyon. The Williams mine was on the same side. I do not know which way they dipped. I never had a thing to do with coal mines. I don't think I ever saw any coal exposures on the left hand side as I went up. The three cabins have been gone a good many years. I could not say how long it was since they were removed. The Williams boys were digging at the time I saw the Wilson mine. That was before Statehood. I believe it was admitted in 1896. I don't know on what section I saw the Wilson or the Burgess coal exposures. It was the left hand fork of Miller Creek. It is called the South fork, or left hand fork. I knew at that time what was called the middle fork. The Wilson and Burgess mines were not in the middle fork, but in the south fork.

76

Redirect Examination.

The Wilson and Burgess mines are in the left hand fork of Miller Creek Canyon. The south fork is the left hand fork of Miller canyon, the way I understand it, and the north fork would be the right hand fork of the canyon. The south fork would be the left hand fork of the canyon, and that is where I saw the coal exposures. The mines they are working there now, the Consolidated mine, is in the middle fork. And when I spoke of the left hand fork, I meant that it is the first fork south of the middle fork.

Cross-Examination.

I do not know if the Consolidated Coal Company works in the middle fork, and I do not know the name of the company, but there is a company working in the middle fork, working at the present time. That is what I understand is the Consolidated Fuel Company.

William McFarland, a witness produced by the complainant, being first duly sworn, testified.

My name is William McFarland, aged 45. I live in Cleveland. My occupation is that of farming. I have lived in Cleveland a little over twenty years. I went there in 1889. Went there to farm in San Pete County. I lived in Cleveland since then. That has been my home. I am a farmer. Had experience in coal mining in Miller Creek Canyon. That was along about 1899 and 1900, 1901, 1902 and 1903. I was digging coal part of the time there for myself and a few other parties. It was at what was called the Wilson mine. I was hauling it

home for fuel, and I sold some of it to people in Cleveland. That was in 1899. That was when I first begun that work. I am able to locate that mine, Exhibit I on the map. That would be this middle one here; the middle opening. The way it is located on the map it is in the northwest quarter of Section 32, that is in Township 15, South of Range 8 East.

I opened and worked the mine because my partner and myself thought of buying it, and we went in there to open up the coal and see whether it
77 was good coal. There had been about thirty feet of work done on it before we went there. When we quit digging it was a little over a hundred feet. I had known of these claims for about ten years previous to starting work there. The first time I had any knowledge of coal there was in 1889. I went out with some other people in 1889 to find a coal mine, and as we were coming down the canyon we met Hy. Wilson, and he took us over and showed us where he was working. There was a hole there between eight and ten feet, I should judge. There were two openings there if I remember right. There was one right on the point and up a little further in the canyon to the right there was probably fifty feet, was another small opening on the same vein. The vein was just squared up about—it had been faced up so you could see the coal. Wilson had gone in about ten feet in 1889. The bed was about five feet wide, or five feet [hing]. That is the same opening that I afterwards worked in ten years later. The coal that we took from the opening was good merchantable coal of good quality. I am able to say where some of the posts are of the adjoining section. There is one corner that I could locate. That would be located in a little flat right there in the corner of Section 33. There is a little flat there that would be a quarter post of Section 33. It would be the corner between the southwest quarter and the southeast quarter and the southwest quarter. It would be the north line; the north quarter post of Section 33. I do not know where Mr. Wilson is at the present time. I believe that is eight or ten years ago when I last heard from him. The party that went out there with me the first time was Sampson Potter, John Edef, John Timothy and a man by the name of Peter Parson. We were the [parth] that were prospecting for coal. The vein we worked in was dipping to the north and the west. We stopped digging there because we found a larger vein below that we thought would be better to work.

It was about one hundred and fifty yards below the
78 Wilson mine, lower down the canyon. All I can tell about it is we went down there and discovered coal there and went in. We dug in there probably thirty feet. The

vein was nine feet and some inches thick. I don't know exactly. We first uncovered coal there in 1901. We dug a little there in 1902 and again in 1903. We run in on the vein something near thirty feet. That was ten years after Wilson showed me the other opening. I did not see this other vein at the time I saw Wilson's in 1899. I worked in two coal beds on this section. We regarded it as good coal land and were trying to enter it when we discovered that the land had been sold to the state as school land. When we were up there in 1899 and Wilson showed us the opening at the Wilson mine, we saw another opening above on the ledge above that had coal in it. That was something [lime] seven feet. A bed seven feet in thickness, something like that. There was a set of timbers in the mouth of it. I do not know who made that opening at that time. It was in 1889. I don't know how many years before that it was done. They had gone in two or three feet, just faced it up. That is the third vein. Two of them I worked in and the third one I just mentioned. I did not see any other vein there. We found the coal croppings above there, but no definite vein. We were about [in] ten or fifteen minutes looking for the fourth vein. We had been talking about a vein over in Cedar Creek, and we were hunting for that. It was supposed to be eighteen feet thick. We saw croppings of coal and dug into them. What we supposed to be croppings of coal. It was black such as would lead a person to think there was coal in it. We satisfied ourselves in the ten or fifteen minutes we worked there that there was vein there. How thick it was, of course, and the length of it we could not tell. We believed the lower vein was the Cedar Creek vein. I know of three veins there, and was satisfied there was a fourth in that section. The lower mine that was opened up we supposed to be the Cedar Creek vein.

79 This is the Cedar Creek vein on the map (pointing) in section 9 about two miles south, I should think. I can locate it upon the map. It is in Section 9, Township 16, South of Range 8 East.

Cross-Examination

I see Cedar Creek marked there on the map, and I followed it up; as to whether or not that is the location on the ground, I do not know. I do not know whether that coal cropping is in Section 9, except where it shows on the map. The vein that I and my associates found in 1889 was not the lowest bed of coal. There was one still below that. It was the lowest exposure of coal at that time, in 1889. There were two other veins we worked on in 1891, 1892 and 1893. The fourth vein would be about one hundred fifty yards below the one I

worked on in 1889. It would be to the east. We didn't do any work on this lower vein at that time. It is a nine foot vein. That is the one one hundred fifty yards below. That is the one I am speaking about. It was about nine feet. Yes, the fact is, I worked on the very lowest occurrence of coal, geologically; the lowest or bottom as far as we knowed, and above that there were three other veins. The vein was about nine feet thick, or thereabouts. One immediately above that was about five feet thick. The one above that was about seven feet. I have no idea how [think] the one above that was. I was a cropping there. I did not see a vein there with coal a natural exposure on it, eighteen feet thick. It was just faced up about three feet. The middle vein was about five feet thick. On that vein Mr. Wilson had drilled a hole eight or ten feet. A little further up there he had another opening on the same vein. This was in 1889. The bottom vein had no opening on it in 1889, but in 1899 we drove an entry on the bottom vein. We began the entry in 1901, and we quit when we had driven an entry there thirty feet. The vein Mr. Wilson pointed out to us was driven about twenty feet between 1889 and 1899, and between 1899 and 1902 we drove it an additional distance of seventy feet. When we
80 worked there in 1902 it was about a hundred feet in.

Between 1899 and 1902, we did not drive any of the other entries I have spoken of. We did not work upon those. The one we drove the entry seventy feet was about eight feet wide and we drove it about twelve. It was about five feet [hing]. We did not break the hanging wall of the coal. We just took the coal out up to its partings. On the nine foot vein we took all the coal out to make out entry nine feet [hing]. It was about twelve feet wide, something like that, and nine feet high. We did not timber for the thirty feet, but we put in some timber. We dug that out to the hanging wall. No work was done between 1889 and 1902 on the third vein which I said was seven feet thick. That was simply a cropping or face. After 1902 I was next there in 1903, and did some work there. After 1903 I visited it every year after that until two years ago. I did no work. I have not been there in the last two years. I do not know if the entries were extended after 1903 because I did not go to them. I simply rode by them. I was up there after cattle, and sometimes after timber. I did not go there after coal. I just saw it in a casual way as I went by. I did not make any appliction to purchase this land, but got an attorney to hunt it up for us, and he informed us that it was sold to the state, and we ceased our efforts in that behalf. I have not made an effort to get it since this litigation was begun. I first talked about my

testimony in this case with Mr. Wade, I believe, the Government agent. I think it was about a year ago. I have not talked with him since. I have talked to him since I have been in the city.

I never made any measurements to show me that there is any coal in Section 32, Township 15, South of Range 8 East. I could not testify to being sure that that was on that Section. I could take you there to the canyon and find it, and I can tell you it is Section 32, and I know this from following up that canyon that land from where I found the corner there.

In finding a corner of another section I am able to con-
81 clude that this coal land is on Section 32.

In 1899 the Wilson coal mine was located in what was actually called then the left hand [form], in other words, the south fork. We actually called it the left hand fork. There was a small fork that runs up there from the main canyon after you get up the canyon a ways. That is what they would call the left hand fork of the left hand fork. I don't know that it was called anything. It was the main canyon with two little canyons that run off. I don't recollect that the canyon where the Wilson mine was, was known under the name of South Fork. There are several forks that went up. The south fork is not a considerable branch, it is just a canyon that runs up there. I don't know how far; I was never up there very much. There is a big coal mine in what I call the left hand fork, and that is where the Wilson mine was. The big coal mine, the Concolidated Fuel mine, we always knew that as the middle fork. That is what it was called at that time, and where the Wilson mine was we called the left hand fork. The first canyon taking off from the mouth of the main canyon is where the Wilson mine was.

Redirect Examination

I did see that. I had been up there nearly every year, except the last year, for the last twenty years. There was a period there I did not go up in that canyon until we went in there to dig coal. I am as familiar with the location there as I am of my own home. I know where the Consolidated Fuel Company mine is now, and I know exactly what direction the Wilson mine is from the Consolidated Fuel. It is south of the Consolidated Fuel. I should judge about two miles. That it is taking it over the mountain. I would say if you travelled over the hill it would be about two miles. The Consolidated Fuel is commonly known as being in the middle fork of the Canyon, and the mine we have been talking about as the Wilson mine, is in the first fork south of the

middle fork. That is commonly known among the
82 countrymen down there as the left hand canyon. I say I know that is in Section 32 I knew the Williams boys. Wilson showed me an opening in 1889 of ten feet, and when I commenced work later it had been run about thirty feet. I only know who run the twenty feet from what parties have told me. I have heard people talk about there being there working. It was generally known in the community that the Williams boys were working there. That is the way I wish to be understood. The Williams Boys were working there and did that work. I could not give you the date when I understood they were working there. I am not able to locate the year.

SAMPSON E. POTTER, a witness produced by the complainant being first duly sworn, testified.

Direct Examination

By Mr. Maynard:

My name is Sampson E. Potter, age seventy, I live in Cleveland. I am doing very little at present, only just running a truck garden. I am a little hard of hearing. The first time I came into Cleveland was in 1885 to look over the country. In 1886 I took up land. After getting my first papers in 1887 I came into Cleveland and built a log house on the quarter of land. I have lived there ever since. That is my home.

I have had experience in coal mining. I have been about forty-five years, off and on under ground. I came to this country in 1883. I landed in Schofield on the 3rd of May. My family followed me in 1884, and came down here in 1885, and located over in Cleveland. I worked in the coal mines in Lancashire, England for about thirty five years as a coal miner. Over there I dug coal and ventilated and everything, from sinking and one thing and another, from making a hole in the ground to filling it up and I brought my character to this country as an expert. The furtherest depth I worked was eight hundred yards, that would be twenty four hundred feet. I have personal knowledge of the min-
83 ing of coal at a depth of twenty four hundred feet under cover. It is hauled up through shafts. I worked there myself. I went as far underground as seventeen hundred yards on each side of the shaft. I had about fifteen miles a day to travel. When I came to this country I worked in Schofield and knew Mr. McFarland, he is a neighbor of mine. He was just on the stand. I have personal recollection of going with him and others to prospect and develop coal. It was in the spring of the year of 1889. The party was

made up of William McFarland, Parsen, John Edef, John Timothy and myself. That was my first trip on the mining business, but I had been up Miller Creek before getting logs for buildings and fences. The first time I was up there was in 1885. We were on a prospecting expedition to find coal. We met Wilson and he told us about the prospects of coal. I was the miner of the party, and there was about two inches thick of tracings to begin with, and we worked it in the edge of the rock from the hill side six feet. Worked all day until we could see no longer for want of light, and I got a layer two feet and three inches thick, and I have never been from that day to this to that place. That was the first of my going into the camp. It is where they are locating their town now. I have not been in the canyon since those days. I refer to this company's town, the Miller Creek Company, the Consolidated Fuel Company, a different side of the canyon to Wilson's mine. On the following day Wilson asked that we go to what they called the south fork to locate a mine that he had there and he invited John Edef, me and John Timothy to go in with him to develop this mine of his. We went up to the mine, as near as I can judge, and he had worked it about nine or ten feet, close to the cropping, and we were, Edef and me and Timothy, to work the coal and he would haul it to Price, and we put the question to him and asked him what we could make, and he said he could make three trips a week and make six dollars a ton in trade and such like, and we figured it out and there was nothing for us and so we didn't engage with him. That is all I know about
84 them mines in Miller Creek. And I left it to him. Other parties have since come in there. I had had some thirty years practical experience at that time as a coal miner. I formed a conclusion from the face of the entry as to the quality of the coal, and I believe it is the best coking coal there is in the canyon today, as far as my experience is concerned, and what I have had with the others. I never have been there since.

Cross-Examination.

I have no interest in it. I am able to testify after twenty years that Mr. Wilson showed me an entry there eight or ten feet long, and in another place about six feet, as near as I can remember from the cropping. The reason why I fix it in my memory, I came into this country to build a home and I first went there in the canyon in 1885, and I was in there every year up until 1889. I didn't have any interest in the Wilson mine. We didn't take any interest because he would not pay us. I could not make any money out of it, and dismissed it from my mind. I never troubled myself about what them fel-

lows had done since. That has nothing to do with me. I was asked if I would testify by Mr. Wade, the Government agent. It was about twelve months ago. He was coming around and asking me would I come and testify. He didn't ask me what I knew about it. He asked me,—he heard I had been in the canyon and known of coal twenty years ago or something like that, and I said yes, and he asked me would I testify to that. I have not talked to Mr. McFarland or with anybody. Nobody except Wade. That was a year ago. My memory is perfectly clear about eight or ten feet. The coal there in the Wilson mine is about five feet thick. I never went in anything just the Wilson entry, you may call it. There was just that and another place that somebody had been—At the other place the coal was seven feet thick. It was not down to the bottom, they had only scratched as you may say, but it was the same vein Wilson had. It dips west, I think, southwesterly,
85 something of that kind. I observed that by the cap that was on it; the opening Wilson showed me on the two openings on that bed of coal, five feet thick. I think it dips to the southwest, what we call dip. The same as up in the canyons, the same as up in the hills. There was no lines on it. I don't know what section of land it was on.

SAMUEL NELSON ALGER, a witness produced by the complainant being first duly sworn, testified:

Direct Examination

By Mr. Maynard:

My name is Samuel Nelson Alger. I am 51 years old. I am a farmer by occupation. I live in Cleveland. Lived there since 1885. That is, most of the time. I was gone from the fall of 1890 until the spring of 1898. That is, I was out most of the time until I came home. I had my place rented and worked in Sunnyside a few years as a stationary engineer to the spring of 1898 for the Utah Fuel Company. I kept my home in Cleveland. Rented it and moved with my family to Sunnyside, but my family was there part of the time. I lived in Cleveland from 1885 to 1890.

As to becoming familiar with the lands that are in [dusputc] in this law suit. I was over that ground. I was over that ground in the summer of 1887. We were getting out timbers, and I went up the canyon in the middle form where the Consolidated Fuel Company is working now. We went up in there and stopped for I guess two months nearly, and I milked some cows, and worked in the timber. Got out some timbers for the farm. Of course, I was around there some then. That was in 1887. It is known as the middle fork of Miller Canyon, or left hand fork and middle fork. The left hand fork or south

fork has a branch or two after it goes up a mile or two or something like that, I should judge. I should judge there is two or three branches in that also. There was some confusion as to those forks on the public map. According to the map, I was looking at it a while ago. What you call the south fork is what we called the left hand fork. As we went up the
86 left hand fork and middle fork there was branches and in the right hand fork also had branches in it. The south fork and the left hand fork is the same fork. The middle fork is where the Consolidated Fuel Company's mines are located. That fork is north from the left hand fork. It might not be directly north everywhere, but it is north from the left hand fork. It is right over a ridge. The two forks are separated from each other by the high upper land. There is a high ridge right over there. I don't believe you can ride horseback over the top. It is very rugged and I should think to go over it would be something like a mile and a half, probably over the top and down in the other canyon. At least I should think that. If there was a tunnel straight through it would be not as much as half as far. Don't think it would be as much as a mile anyway straight through. It [ain-t] very far through there, I guess a mile, but probably it is quite a long ways up over the hill. I discovered evidences of coal in the middle fork when I was up there in 1887 where the mines are now of the Consolidated Fuel Company. I saw streaks that I kicked out at times, and I got pieces of coal and took it down to try it. It would burn some, of course, not like right good coal, but it would burn. I was satisfied that there was coal there in the middle fork at that time. It was up on the side of the hill. It would burn if you would kick it out deep enough and get some that would have life enough to burn. I was up the left hand fork. I was over there once or twice or two or three times. I remember once I came down there, when I was hunting deer. There was a good many deer in that country, and I was over hunting there one time and I remember being on this ground during the summer of 1887. As to the evidence of coal, I saw one place where someone had opened a little mine, probably four or five or six feet. Just opened it in the face. That was in the left hand fork. There was no one with me right at the time I stopped and looked at that vein.
87 There must have been four or five days work done there. Might have been more. There was enough so that there was a face there. It was faced up so you could see a vein of coal there. It looked to me like probably the vein was five or six feet high. Might have been higher or lower. I know it was on the floor and might have been a little above, but I never examined it close. There was a good face of coal there. There was a vein of coal.

Cross-Examination.

I don't know on what section of land it was. I don't know anything about it. Not one thing, because if it was surveyed at all, I did not know anything about it at the time. I don't know the day because I have not looked it up at all.

LEWIS LARSON, a witness produced by the complainant being first duly sworn, testified as follows:

Direct Examination

By Mr. Maynard:

My name is Lewis Larson, I am seventy three years old past. Live in Cleveland. My occupation, I have been farming and blacksmithing now a little since I got so I could not tramp around on the farm. I have a farm in Cleveland. I have been there since 1887 or 1888, lived there ever since. I am engaged in farming until lately I got so I could not walk around well. I have made use of coal. I have used it. I got it from Cedar Creek, and I got some from Miller Creek last fall, but the last I got from Cedar Creek. That is on account of the deep snow. I did not get it myself. I got my sons to haul it. I have been acquainted with the coal in Miller Creek some twenty years; that is, I guess it is some eighteen or nineteen years, anyway. It was soon after I took up my home in Cleveland. I got timber in Miller Creek to build my house. That was in 1888 and 1889 and 1890. I am not perfectly familiar with the different forks of the creek.

I believe I know where the Consolidated Fuel Com-
88 pany's mine is, but I have not been there to see it, but I have got coal from [—] I suppose they have got their works now. Had coal from there. I have not been up since they started to work, and so I don't know where they are now, but I suppose that is where they are located. I know the left hand fork some. I have been up there. I have not got coal from there. I was up there hunting horses. That was in either 1888 or 1889 or 1890, I am not positive which. As to who was with me, there was a crowd of us, but I don't remember who they were. I believe one of my sons was with me, but I am not positive. I believe it took us two or three days to make a trip and get timber out. We were gone some days from home hunting horses. At the time we were up the left hand fork of the canyon I saw some evidence of coal. I saw a hole dug in the side of the hill there and coal coming out of it. I don't remember how much of an opening had been made there. Some four or five feet wide, probably a little more than that in the hill, into the side of the hill; dug into the face of coal, is all. The vein was faced up. I believe it was, or nearly so. It might perhaps been down deeper, that

I cannot tell; but the vein was there, the face was there, that is all of that. Then of course you could see the croppings of the coal all along the face of the hill there. Every little while it cropped out. It was in what we settlers called the left hand fork of Miller Creek canyon. Some calls it the south fork, but it means the same thing; it is the left hand fork. There was just this little prospect hole. No entry. I did not see any other occurrence of coal there. I did not make any examination, I just passed by it and looked it as I passed along looking for the horses, is all. It was in 1889 or 1890, I am not positive which. It was one of those years, because I was building my home there.

Cross-Examination

That was the only hole I saw there. I was not looking for coal. I do not know what section that was, nor anything about it. All I know is we called it the south fork.

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89 ROBERT WHITEHEAD, a witness produced by the complainant being first duly sworn, testified:

Direct Examination

By Mr. Maynard:

My name is Robert Whitehead, am fifty six years old, fifty seven next birthday. Live at Cleveland, Emery County, Utah. My occupation is farming. I have been living in Cleveland nineteen years.

As to observing occurrences of coal in the left hand fork of Miller Creek Canyon in 1893, I was getting out some poles and timber there for to build my home in Cleveland. In going out there I had my team, and being scarce of feed, just turned my horses on the hill, and I got my load of timber out there and I went on the hill to get my horses, find my horses, I found my horses and started down a little trail around and I come across a little bank there that was throwed out of coal, and I sat right down on what you might call a coal dump and rested a little bit with my horses. I did not see a face, just saw a hole, it didn't go in. That is what they called the Wilson mine. I know they called it the Wilson mine.

Cross-Examination

I know they called it the Wilson mine just by people calling it that. That particular hole. It was a little hole. I heard it called the Wilson mine before that time. I never saw it before that. I know it was called the Wilson mine because people told me. It was just a small opening. I don't

know how big, I didn't measure it. It was big enough for a man to go in and work. I don't know how far in it extended. It was not a very big dump. It was a nice little dump where they fetched out some stuff and dumped it out there. It was bigger than the chair I am on, the platform I am sitting on. I might be ten or twelve feet around. I did not measure it, as to how deep it was. It came out and make kind of
90 a dump, kind of a yard. Just as they come out they dumped stuff off and leveled it down. There might have been coal fetched out there and dumped. It was a big hole. It might have been ten by ten, or a little more. I could not tell you exactly, because I didn't measure it. My best judgment it is about ten feet square, about that. There was a little dump. I believe there was some timbers, but I could not say that positive because they generally put a set of timbers there. I know it by the Wilson mine. I do not know what section it was on. Don't know anything about that. It was in what they call the left hand fork. The south fork I know nothing about. I never heard tell about that down there in our place or any other place there as the south fork. It goes by the name of what we call it, the left fork, and the middle fork and the right hand fork. The right fork extends on up the canyon. I don't know anything about the east fork. I never saw the south fork by that name. Don't know anything about what section it is on, nor what quarter it is on. I got my poles out of three forks at different times. On the trip in 1893, I got it out of the left hand fork, quite a bit of timber there. In some places a heavy growth of timber. Off and on people had been getting it out of there for many years, for five or six, probably eight years. It was good grazing land.

Redirect Examination

I know where the Consolidated Fuel Company's mines are, and when I [say] sitting on the dump, the direction of the Consolidated Fuel Company's mine would be what I call south of it from the hill, just over the hill south.

Cross-Examination.

The Consolidated Fuel mines were not being operated at that time. I saw coal in that canyon where the company is now. There was no coal developed that I saw at that time. It was a few years after. In a year or such a matter a man by the name of Anderson had a saw mill in there. I was
91 last there five years ago. That is up the north fork, or up Miller Creek. That Company was not working there then. I was last up Miller Creek two years ago. I took a gentleman up to that work where the Consolidated Fuel

Company's mines are. One of them was working. That was up what we know as middle fork. I did not see the Wilson mine. I did not go over to that.

THOMAS DAVIS, a witness produced by the complainant being first duly sworn, testified.

Direct Examination

By Mr. Maynard:

My name is Thomas Davis, I reside in Cleveland, Emery County, I am forty three. My occupation is farming.

I am acquainted with the different canyons and different forks in Miller Creek Canyon. As to seeing coal in the left hand fork of Miller Creek Canyon to the best of my recollection it was in 1890 and 1891. I went up there with my father. We were going up to get some lumber to build corrals with poles. I think it was a Mr. Wilson wanted my father to dig coal for him. My father told him he would go up and see the mine, but he would not make any agreement with him, I was right there driving for him, and my father was on the wagon at the time, and I was driving for him and my father was on the wagon. Mr. Wilson and him was talking and my father told him that he would go up and see the mine. We went up the left hand fork to see the coal mine there on the right hand side we saw the coal there. We went in about ten or twelve feet, not to exceed twelve. I saw coal there. I should judge it was about five feet high, maybe eight feet wide. Mr. Wilson was not there. He did not go up with us. We decided not to work the mine. I am able to fix the time because in 1889 the Huntington People applied for an injunction on the water we had on our land on the north side, and my father had to move his place from the north side to the
92 south side in 1890, and we was building up this place we had moved to; we was getting poles and that is the reason why I fix that date. Years afterwards I took some coal from that mine, but not at that time. I took coal from that mine years afterwards. It was in 1901 I hauled a load of coal for my father.

Cross-Examination.

I just noticed one vein up there. Did not look for any more. I just saw one entry. That was only about ten or twelve feet. That is all the work that was done then. It is all I saw. The vein was five feet thick. The entry was about eight feet wide and in ten or twelve feet. It was in either 1890 or 1891. I can't fix the date definitely. I don't know why we didn't have Wilson go with us and visit the mine. He was talking to my father. I was on the wagon driving the

team at the time; my father was sitting there. Mr. Wilson didn't go. It was up the left hand fork. That was my first visit. I believe it was the first time I was up there. I know it was the left hand fork because I heard it called the left hand fork in Cleveland. I know the left hand fork when I saw it, I mean it was the first visit I have any recollection of. I went up there and got into this fork and knew it was the left hand fork.

Redirect Examination.

I know it was the left hand fork because I had been up there in the middle fork hauling timber down and logs; and also the right hand fork for Mr. Ras Anderson's mill and hauled it over to Price. I knew the left hand fork when I saw it.

Cross-Examination.

I didn't say that my first trip up Miller Creek Canyon was made in 1890 ah 1891. I said up the left hand fork. I knew it was the left hand fork because I had been hauling lumber of the middle fork and the right fork. I had been up
93 there lots of trips, but this was the first trip I had been up the left hand fork according to my recollection. Maybe I have heard it called the middle fork, but I know the canyon was the left hand fork. I don't remember the witnesses calling it the middle fork. I don't know where the east fork is. I don't know where the north fork is. I don't know the south fork. I don't know any of them by those names. As I said before I know them by the left hand fork, middle fork and right hand fork, that is the names I know them by. I cannot place that portion of Miller Creek that runs southerly in the southwest quarter of Section 27, Township 15, South of Range 8 East on the map. I don't know in what sections I saw the coal, nor what township. I was last up there in 1901. I hauled a load of coal from there for my father; he bought it from McFarland.

I first talked about my testimony in this case with Mr. Wade the Government Special Agent. Mr. Wade came over there a little over a year ago. I have not talked to him since. I did not talk to Mr. Maynard the Government attorney. Yesterday I came to the map. I came over to the map with Mr. Maynard. I was talking about anything in common that came up. I guess he was talking about the map. I was not talking about the case.

ANDREW F. JOHNSON, a witness produced by the claimant, being first duly sworn, testified as follows.

My name is Andred Frederick Johnson, aged forty four, live at Cleveland, Emery County. Occupation farming, lived there since 1889. I know the different forks of Miller Creek Canyon. I have seen coal occurrences in the left hand fork of the canyon. In the year 1893 I was in the left hand fork of Miller Creek Canyon after a load of timber, and we camped above the opening there that was called the Wilson Mine; camped close by there, and we came down and looked into it. I looked into the opening there. I saw an opening there I should judge about eight feet wide and about five feet
94 high and about ten or twelve feet deep. My brother was with me. It was 1893 because my brother was building a granary. We got the poles for a house in what is known as the right hand fork in 1889.

Cross-Examination.

I first saw the coal in 1893. I suppose it was about five feet thick. The entry had been driven in about ten or twelve feet. I did not see any other coal there and no other opening. If there were other openings I did not see them. We were there after a load of timber. I walked to see the entry just for curiosity. We had heard talk of Wilson having a coal mine there. That was the only coal that I saw anywhere in that neighborhood. I did not know of any south fork at that time. I saw a few little croppings in the right hand fork, but I didn't see any in what we call the middle fork. I was not at the middle fork at that time. I was up the middle fork. I don't recollect the year, a few years afterwards to the saw mill. The saw mill was working there. I did not see any coal there then. I have been up what is called the right hand fork. I saw some croppings up there. That was in 1889. I did not see any there in 1893, 1894, 1895 or 1897. I worked in that canyon in 1899, in the right hand fork. I was last in the place where I saw the five foot vein of the coal in 1894, I think. I was there hunting for cattle at the time. I saw the mine at that time. I went into another opening that Peter McFarland had opened. It was about a hundred and fifty yards below the Wilson mine. The entry was in about thirty feet, I should judge. I went in out of curiosity [?] No one was working there. I did not notice any other opening. I did not see any coal up the right hand fork. I did not see any coal in the middle fork. The only place in the whole vicinity around Miller Creek that I saw coal was the McFarland coal, and what was called the Wilson coal. That was as late as 1894.
It was in the fall of the year. I was next there in 1908.
95 I was after a load of coal at the Consolidated Fuel Company's mine. There had been coal development be-

tween 1894 and 1908. I do not know on what section of land the McFarland and Wilson coal was situated, and I didn't know in 1908 and I do not know today.

Redirect Examination.

I don't know the sections. There are three different streams of water in the canyon. One in the left hand fork; one in the middle and one in the north fork. I do not know if there are any more. They are large streams that run through the canyon.

JOHN PETER JOHNSON, a witness produced by the complainant, being first duly sworn, testified.

Direct Examination

By Mr. Maynard:

My name is John Peter Johnson, am 42 years old. My occupation is that of farmer. I live in Cleveland. Have lived there nineteen years since the spring of 1891. I am a brother of the witness who just left the stand. I am acquainted with the different forks of Miller Creek Canyon. Have made some trips to that country. I have never worked there at coal mining, but I have gone there for timber, such as house logs and poles. I first found coal there in the early spring or summer of 1893. I was up there at the time after some logs to build a granary, and while we were there we made a camp right close to what is known as the Wilson mine, and while we were camping there we saw a small dump there where there had been coal taken out, and walked over to see what it was. I saw a hole had been dug in the veins of coal there, it was probably five feet high, or such a matter. I could not say how wide it was. I think though about seven or eight feet. I did not go into it. If I remember right there was one timber on each side, and one across. I have been up the other canyon. I know three streams of running water in each, the left, middle and right hand forks. I cannot say what section it was on. I believe it was unsurveyed at the time. I was last up there I think in 1906. I didn't go to the mine. There
96 were a great many timbers in that fork. It was a pretty good grazing country too. I hauled two loads of logs out of that canyon. That was the only opening I saw. I never saw any other coal vein there at any time.

BEEMAN OVIATT, a witness produced by the complainant, being first duly sworn, testified.

Direct Examination

By Mr. Maynard:

My name is Beeman Oviatt, I was born in 1863. I live in Cleveland. I am a farmer. I have lived there ever since it

started, about twenty-three years ago. I am a son of the old gentleman who testified here yesterday. I went there when he did in 1884 and 1885. I was to home at that time. I run cattle in that country. The cattle range up in the Miller Creek County. I am acquainted with the different forks in Miller Creek Canyon. There is what we call the left hand fork, the middle fork and the right hand fork. That is what they went by in our time. There are running streams of water in each. In the latter part of the summer the left hand fork is dry down to where it forks, but above it is always running. It runs a ways then it sinks and then it will rise again, and it runs for a ways. I saw in the left hand fork where there had been some coal throwed out on the ledge at one time. I was running a bunch of cattle and they run in and around on the side of the hill and I was in above them and I went by this place where I supposed there was a [hold] dug, and I never stopped to look at it, I was in too big a hurry right at the time. I saw the dump. That was about 1891 or 1892, somewhere around there. I don't know just the year. I was around in the canyons off and on the last twenty years and this left hand fork, I was not in there as much as I was in the other two.

W. L. WALKER, a witness produced by the complainant being first duly sworn, testified:

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Direct Examination

By Mr. Maynard:

My name is W. L. Walker, I am 29 years of age. Mineral inspector of the General Land Office; residence, Salt Lake City. I have been with the land office as mineral inspector since May 1907. Prior to that time I was with the Geological Survey. I was known as a field assistant with the Geological Survey doing mineralogical work and field examination work. I was not with Mr. Taff during that period. I pursued a course in geology and mining at Stanford University, graduating from such course in 1903 with the degree of A. B. from the Department of Geology and mining. This is the degree given by the University to students pursuing this mining-engineering course. Subsequent to graduation I spent some time during two summers in practical work, in practical assaying at the mines in California, and have had something like one year's experience in city surveying and have had some experience in the field with professors and instructors in geological lines from the university, and then entered the service of the Government, doing mineralogical work at Portland in 1905. Then subsequent to that, while in the service of the Government, I made field examinations in most of the western states, hav-

ing to do with the question of mineral values with relation to placer and metal deposits, and particularly with reference to the geology of coal. My services on the Geological Survey extended until May 1907, at which time I was transferred to the General Land Office as a mineral inspector. Since that time my time has been largely taken up with these examinations of properties and land on public domain, with reference to the mineral or non-mineral character. I have had rather extensive experience in Utah, particularly in the Book Cliff coal fields. I have spent some time also in the coal fields of the Iron County districts in the southwestern portion of the State. My experience in those fields has consisted
98 in work with relation to the general geology of the coal formation and in detail with reference to the occurrence of coal in relation to particular tracts. In a general way I have observed with relation to the general geology of the Book Cliffs district from near the Colorado line around to Castle Gate and southerly into Emery County, as far as Emery. My more specific work of investigation, however, has had to do with the formation as exposed at Sunnyside and from Soldier Creek westerly to Castle Gate, and particularly in Miller Creek south of Castle Gate. I have also made observations in cross country trips, passing back across the Book Cliffs from Soldier Creek over into the Nine Mile Country, Minnie Maud Creek. The Book Cliffs, or the Book Cliff district, consists of sedimentary formation, chiefly sand stones and shales with some limestones [occur-ing] in the upper or tertiary member of the series. I may say that the coal bearing measures, the coal formation is found in the series of sand stone which are the prominent sand stones of the district. Beneath this coal bearing formation there is a large thickness of shales; further down the Dakota sand stones. The coal bearing formation itself, as I have said, is the upper sandstone and above this comes the series of thinner bedded sandstones and shales and limestones, making up the Tertiary member of the formation in this field. Geologically the sedimentary beds are almost horizontal. By that I mean, the dips are moderate and that the region is not one that has been affected by massive thrusts with the attendant production of deeply dipping beds. The name of Book Cliffs, at least that portion of the name "cliffs", has evidently been given to this portion of the country in view of the fact that there are very prominent cliffs extending about the Price River to the Castle Valley and which rise from these valleys in deep cliff like slopes. That is the prominent structural feature of the Book Cliffs as you view them from the valley floor. The average height of the cliffs, roughly speaking, I

should say, is about fifteen hundred feet. The breaks
99 in the cliffs are known as canyons and draws. From the coal mines at Sunnyside west to the coal mines at Castle Gate I should estimate the distance to be twenty-five miles. I have examined the geological formation of those two points and have noticed all the beds of coal at those mines and the geological data connected with them. I have not followed the formation continuously at close hand between the two points, however, I have been rather close, have rather closely followed the formation from Castle Gate easterly to as far as Soldier Creek, and from Soldier Creek on easterly to Sunnyside. I have traced these at a greater distance, but by the eye. The formation is the same as Sunnyside as at Castle Gate, that is, the coal occurring in the same series of rock. This series has commonly been called the Laramie series, although at present there is an inclination to give it a greater age and call it Mesa Verde, but the lithological characteristics of the formation continue constantly from Castle Gate and on easterly to Sunnyside; that is the principal characteristics of the coal bearing formation are the massive sand stones, and particularly the one massive sandstone known as the Castle Gate coal floor, with other rather similar sandstones above, and this formation occurring immediately above the leaden gray shales of the Colorado and Montana formation. The geology is similar over this distance, the beds remaining approximately horizontal, that is, with very moderate [dipp] away from the valley, and with no marked interruptions in the continuity of the formation: that is, such movements as have occurred in the formations have been simple flexures and not movements of magnitude.

At the town of Castle Gate, I observed in the vicinity of Castle Gate, in the coal formation where caused by the drainage of Price River, coal is exposed in a number of places, the formation being known to contain workable beds of coal at this point. I did not examine the beds in the mine itself, but I
examined some of the beds of coal which were ex-
100 posed in that immediate vicinity. There is a mine in there known as the Castle Gate mine. I understand it is now being operated. It was the last time I was through the district.

At Sunnyside the coal there is coal occurring in this coal bearing formation which is so generally extended throughout this district; the coal there occurring in at least more than one bed, at least two beds and in workable quantity. At the last time I was at Sunnyside, coal was being mined from the Sunnyside mine. There is one of the largest mining plants

in Utah there. Between these two points the same coal bearing formation extends from the Sunnyside District to the Castle Gate District.

I know where Section 32 is. It lies in Township 15, South of Range 8 East on a fork of Miller Creek, some twenty two or twenty five miles southwesterly from Price in Carbon County, Utah. Miller Creek is a creek draining from the cliffs easterly toward Price River or Castle Valley, and Section 32 is in the South branch of this Miller Creek; that is, it lies across, and all of Section 32 is tributary to this branch of Miller Creek. It is in which is termed the Book Cliffs field, this being on the south side of Price River. It is generally known as the Wasatch Plateau, this portion in which section 32 occurs. Sometimes known as the Wasatch field, but it is practically one and the same thing as the Book Cliffs, being an extension of them. It is the same geological formation, the coal bearing rock occupying the same horizon in the geological formation, the occurrence being about the same; that is the cliff like head or frontal of the pleateau land facing easterly toward the Castle Valley.

My first examination of Section 32 was made with Mr. Joseph A. Taff, who was at that time with the United States Geological Survey, and with Joseph Jensen of the Land Office, and consisted of a specific examination of this particular
101 section; the location of some of the boundary lines of the section; the location of various points prominent in the topography of the section; the occurrence of such coal openings as were at that time exposed; the inspection of the containing—of the formation in which the coal occurs with reference to natural exposures or the existence of coal blossoms or indications of coal. This examination was made in June, 1909, two days being spent in that examination; but I should state also that during those two days examination was made of the occurrence of coal and the formation of section 29 immediately to the north of Section 32. I made another examination at a later date in August and September, 1909. I made a more extended examination of this particular section. The purpose of my later examination extended in the latter part of August until some time in September, was for the particular purpose of opening to view the coal at such points as were readily accessible. I was over the entire section in this later examination.

The land lying and occurring within the boundary lines of Section 32, is drained by the southerly one of the three branches of Miller Creek, this branch of Miller Creek within Section 32 may be said to have two principal forks and drain-

ing into these forks are numerous rather steep gulches which head up towards the base of that formation which is commonly known as the Castle Gate sandstone. All of Section 32, with the possible exception of a very small area immediately at the southwest corner, is drained by Miller Creek. So that the topography of this section, to briefly describe it, is made up of rather steep slopes from the pleateau land down to the creek bed. The difference in elevation between the creek bed at the point where it crosses the eastern boundary of the section and the elevation of the plateau land, say immediately south of that at the southeast corner, I would estimate to be something like fifteen hundred feet, maybe a little more or a little less. The characteristics of the surface from the creek bed to the pleateau as

I have before stated, it is essentially formed
102 of steep slopes which face the south are comparatively

bare of vegetation as compared with the slopes which face north. Over the surface of these slopes the soil and debris resulting from erosion, breaking off of the formation has widely scattered with, in some places along the same horizon, pronounced exposures of the formation still open to view. For instance, the Castle Gate sandstone considerably above the coal beds themselves, is rather prominently exposed practically encircling three sides of the section. Then too on the north side of Miller Creek, the exposure of the Castle Gate coal floor is rather pronounced and it also appears in the line marked "outcrop" on the south side of the creek. Aside from such exposures of the formation rock itself, the surface is generally covered with [soal] and debris and in some parts it is covered with a growth of brush and trees. The slopes from the creek to the plateau lands are in many places quite steep. The degree of slope is, well, without figuring I could not give you the exact degree, but taking it from a point on the east boundary of the section where Miller Creek crosses that boundary to the plateau lands at the southeast corner of the section, they have a rise of something like fifteen hundred feet; that would be in the course of a little over a half a mile and less than three quarters of a mile. Probably the average degree would be twenty-five degrees. In numerous places, however, the slope of the hill would exceed this, probably rising to as high as thirty-five degrees. On this later examination I first made an inspection along the coal bearing horizon for the purpose of determining these points where the indications pointed to the nearest approach of the solid coal to the surface: this for the purpose of locating the particular points at which I could most readily open up a coal bed to view. After finding such favorable spots I put men

to work in the actual excavation in the construction
103 of open cuts which would display to view the thickness of the various coal beds and after, or at the same time, making surveys for the purpose of locating definitely those points at which coal was at that time being exposed to view. I also selected the work to the end that these open cuts, or prospects, should be constructed of such dimensions as would give a clear indication of the thickness of the coal at these various points. In identifying this section by instrumental work, I started first from the quarter corner on the east side of section 29, this quarter corner being marked and identified by witness trees. I run a line from that corner south to the north east corner of section 32, finding the same in place and properly marked. I also run a line—This was marked with notches as the section corners usually are, having four notches on the east side and one notch on the south side. This was a stone in place with a mound along side. I also ran westerly from this corner to the northwest corner of the section, and I also run a line southerly from the northeast corner of the section southerly to the west—to the east one quarter corner and on south to the southeast section corner of Section 32. I also found in place the quarter corner on the western boundary of the section, with notches as they are usually placed on section corners, and with chiseled one quarter marked on the quarter corners.

Without doubt I know where Section 32 is. I have been on it and seen it. I did other instrumental work in this section, for the location of specific points at which I had opened the coal to view. The location of these particular points at which I had opened coal was made by the use of a transit and rod, according to the ordinary procedure of what is known as topographical surveying. It consisted in the measurement of the distance and the direction or course of the lines which
were run and this survey was tied to Government cor-
104 ners which exist in the field as corners of Section 32.
The instrumental work was done by myself, and I had an assistant or a man carrying the rod. After that the examination or the work consisted essentially then of actual prospecting, that is, the driving of prospect openings on to the various coal beds and at the same time of course, my attention was constantly directed to the geological features appearing in the formation on that section. In my work of uncovering the coal I opened to view coal on each legal subdivision in Section 32, with the exception of the south half of the south half of the section. This south half of the south half of the section lines high up on the slope and in general the surface is rather deeply covered with soil and debris, and with timber

rather commonly existent. The debris and surface covering over this portion of the section makes it rather difficult to at once open to view the edges of the beds of coal without rather extensive prospecting and with more trouble and expenditure of more time and money than I felt at liberty to use during the course of this examination. That indicates and showed the occurrence of coal on twelve legal subdivisions out of a total of sixteen. Starting at the north east quarter of the northeast quarter of the section, coal is naturally exposed to view on the ridge a little south of west of the north east corner of the section something like three feet thick, being exposed at this point. This is well up towards the Castle Gate Sandstone and that horizon is indicated on the map Exhibit B, at Station M. After the completion of my field work I performed office work based upon my notes and I constructed the map showing the survey lines that I ran and also had constructed under my direction the map which now appears upon the blackboard and marked for identification, Exhibit B. This map is based upon the surveys that I made in the field and it was made under my direction and at my orders. The Exhibit truly represents the topographical and other appearances in the field. The topography is not placed there by hatching,
but the approximate appearance of the drainage
105 courses, the accurate location of the points at which I
opened coal and of the opening as they were found upon the ground when I made the surveys, are displayed upon this map and correctly indicate those features of the topography and its position, relative position of the various objects that are displayed by the map. The description of the map is as follows: The base of the map, that is the net work of boundary lines and the legal subdivisions as it occurs upon this, was made by tracing from a map which I constructed myself, and this map as it appears upon the board has been compared by me with that original map, and the base taken from the official Government survey of the section. There are two varying colors appearing upon the map, the yellow representing that portion of the section which lies below the lowest coal bed, and that portion in the burnt sienna or brownish color, representing that part of the section which lies above this lowest coal bed. Upon the map between those two colors there is a dark line which represents the approximate position of the outcrop of the lowest coal bed. There are also, particularly in the north part of section 32, lines approximating the direction taken by this lower coal outcrop representing respectively the position of the outcrop of what has been termed the middle bed or No. 2 and what has been termed the upper coal bed, No. 3. Then there is a fourth outcrop displayed also by the dashed lines which appear upon the map in the northeast

quarter of the northeast quarter and the northwest quarter of the northwest, [—] to station 42, in the west half of the west half, to station 43 and station 41; also in the northeast quarter of the southeast quarter to station 37. Then upon this map there are also certain small red circles within black lines, which represent survey stations upon the outcrop of the coal and at those points coal was opened to view and measurements taken of the section. Those points are designated upon the map as
a station with certain numbers following, and immedi-
106 ately at those points the thickness of the coal as opened
is likewise designated. The center of the section, for convenience is indicated by a circle and with the label "Center of section". Upon the northwest, and the south sides of the section there is a dotted line bordered by heavy red color, which has been placed upon the map to show the approximate location of the top of the Castle Gate sand stone. The drainage courses are indicated by wavey black lines leading down through the yellow color, where [appear] the designation "Fork of Miller Creek". On the left hand portion of the map there appears an ideal section on the plane A. B. C. this referring to a line on the map on section 32, same lettering labelled A. B. and C. In this left portion of the map is shown the relation of the three beds of coal which were found all exposed to view at the time of the first examination, at what are designated by this map as Stations 10-A, and R'. This section illustrates the relation of the coal beds as exposed at those points considered with attention to the topography of the country, the yellow coloring on this portion as well as the burnt sienna color, applies with the same force as upon that portion of the map to the right, the yellow meaning that land or that formation below the lowest coal beds, therefore designated "Non-coal land" and the brown or burnt sienna color, indicating that portion of the formation above the lower coal beds and therefore designated as "Coal lands."

Mr. Maynard: I now offer in evidence, as a part of the complainant's proof in this case, exhibit B.

Mr. Ellis: I object to it on the ground that it is incompetent for the reasons already stated; that section 32 is a school section granted to the State of Utah under the Enabling Act, and whether or not any coal was disclosed upon that section at the time of the Enabling Act or subsequent thereto, is immaterial because there was no reservation of any mineral
contained anywhere in the Enabling Act of the State of
107 Utah.

Said map was marked "Exhibit B, J. W. C." and is returned into court herewith as a part of this report.

Prior to the work I did in August and September, 1909 I had discovered the existence of coal beds in this section. That was at the time of my first examination on June 29th, 1909, accompanied by Joseph A. Taff and Joseph Jensen. At that time I found three openings upon three different beds of coal within section 32, and besides this found the existence or indications of coal at other points upon the section, that is, indications consisting of particles of coal mixed with the soil. The three openings which I before referred to as being in existence at the time of my first examination, are those represented on this map, Exhibit B, as station R′, Station 10 and Station 10-A, all being within the northeast quarter of the northwest quarter of Section 32, At Station R′ there was an opening driven about forty-five feet into the hill in a northeasterly direction, exposing coal of a thickness of ten feet and four inches. At station 10 there was an opening upon a higher bed driven to the north west a distance of a hundred and fifty feet, displaying a thickness of good coal five feet. Then at Station 10-A there was a small opening on the third or highest of the three beds in which there was exposed coal of a thickness of six feet six inches. This last opening was about twelve feet. That was an open cut. The floor measurement was about twelve feet. I examined the coal. I made observations with relation to the existence of the coal at those points. Took measurements of the thickness as I have testified. I observed the formation as to the direction in which the beds were dipping. They are in this section essentially horizontal; there is a slight dip in a general westerly direction of something like two or three degrees. The determination of so flat a dip is a very difficult thing in the absence of extended instrumental survey. But the dip is something like two or three degrees westerly. Evidently the
108 coal had been removed, because the size of the dump at the end of the main workings of a fifty foot tunnel and a hundred and fifty foot tunnel did not appear to correspond with the amount of coal that had been removed. I saw some blossoms at other points on the section at the time of my first visit. The points at which I saw them was in the northwest of the northwest quarter of the section a little below the red line indicating the Castle Gate sand stone. I came upon a blossom of coal, and the blossoms of coal were noted in several points from the southeast quarter of the northeast quarter of the section: also in the northwest quarter of the northeast quarter; and in the vicinity of station designated as Station forty there was a natural occurrence of coal blossom; that is, particles of coal upon the white sandstone and mixed with the soil. I also at that time saw some indications of coal in the northeast quarter of the southeast quarter of the section;

and similar natural exposures where shown somewhat north of the northeast corner of the section, but that would be in section 29. "These coal blossoms" that is a term that coal miners frequently use to describe the appearance of small particles of coal or coal dust mixed with the soil, this mixture of the coal particles with the soil resulting from the weathering down of the edge of the coal; it is a mixture therefore with the material which has resulted from the weathering down of the enclosing rocks. I am not able to state in terms of years the length of [time] that the condition in relation to these blossoms which I saw in 1909 had existed. I don't expect one would assign a length of [time] for the condition of such circumstances comparable to the length of time under which the general character of the hillside itself had existed. That is, the time during which the topography as it existed at present, has existed would correspond nearly to the time during which these natural indications of coal have probably existed, which would be ever since the erosion which
109 resulted in the cutting down of the territory, these blossoms must have existed. I have no doubt that for a long time prior to the year 1896 when Utah came into the Union, or the year 1904, when the Enabling Act was passed, that these blossoms and indications of coal were exposed, speaking from a geological standpoint and from the geological evidence which we have of it there. I believe a [laymen] who knew nothing at all about the occurrence of coal would recognize the blossoms as indications of coal; such a one as would justify him if he were seeking coal in the use of a pick and shovel in attempting to locate the actual position of the coal beds. The first coal that I uncovered in the northeastern portion of this territory was in the northeast of the northeast of section 32. Referring to Station 19 in the northeast quarter of the northeast quarter of Section 32, at this point, before I had performed any work whatever, I found coal blossoms, particles of coal in the soil resting upon the massive white sandstone, which geologically is known as the Castle Gate coal floor. For the purpose of determining as to the appearance of the coal at that point and as to its thickness, I placed men at work who ran in an open cut and actually did expose to view this coal bed at that point, showing a section of four feet three inches of coal. We had to remove the cover only a matter of about two feet before the coal in place was met with, but the open cut was extended back a distance of nine feet for the purpose of fully exposing the face of coal and the overlying formation. The coal bed exposed was four feet six inches and was left as an open cut so that anybody could see it. That is not on the lowest coal bed, but it is the highest

of the three. Then in the southeast quarter of the north east quarter at a point designated [at] Stations 17 and 18, [There] there was found coal blossoms which indicated that coal was in the immediate vicinity of those stations and I put men to work for the purpose of opening cuts which would dis-
110 play to view the edge of the coal at Station 17, being the first one that was constructed; an open cut was driven into the hill a distance of seven feet. Coal was met with of course considerably under this total seven feet length but the open cut was driven for fully seven feet for the purpose of exposing the full width of the coal. The coal bed at this point was found to measure four feet in thickness. At station 18, on the same bed of coal at the same horizon, this being taken as [th-] middle of the three beds, an open cut driven a distance of seven and one-half feet, exposed to view a bed with a thickness of four feet. That is the same bed; and then at Station 33 in the southwest quarter of the northeast quarter an open cut was driven into the hill on the top bed to a distance of seven and a half feet, exposing to view coal of the thickness of four feet. That is the top bed. The natural blossom was in view before I commenced work. That [lead] me to indicate,—that point to my mind, as a favorable point for the construction of an open cut, the blossom appearing to view and lying upon this very prominent white sandstone. By the use of a little hand pick; just scratching a little groove in the surface itself, I came upon the coal in place, so that the coal in place extended practically to the surface, In fact I think it was partially exposed to view by a hole in the course of the gully but at any rate it was virtually at the surface. It could have been seen by the eye of a layman. That was the way I located the point, simple from observation. I came across this point where the coal was standing in view at the surface. Then proceeding to station 13 in the southwest quarter of the northeast quarter, coal was opened to view here. On the middle of the three beds an open cut was driven into the hill with a total floor measurement of seven feet and the bed of coal, as exposed by such open cut, measured four feet, two inches thick, At Station 13 there is a little, very shallow gulch caused by water washing down the steep slope, and a small portion of the bed was exposed to view at the time I went there.
111 I scratched in it with my pick and determined that the coal was there in place at that time and decided that it would be a very desirable place in which to make an open cut. So that at Station 13 coal was actually opened and found to be in place. Out from Station 11 there was a blos-

som apparent, that is, particles of coal mixed with soil, and the proportion of the coal particles were such I decided that the coal was very near to the surface. In fact at this point I scratched in my recollection is, and reached the solid coal in place by the use simply of a small prospecting pick. Then at Station 11 I put my men to work and drove an open cut into the lowest of the three beds, being the one marked on the map as Bed No. 1. This was driven in on two benches; that is, I carried the cut back seven feet, thereby exposing the coal to a thickness of five feet and five inches, then to save labor in removing all of this coal on back, I started at this point to run a second bench back into the coal, another seven feet, thereby showing a total face of coal exposed at that point, and the measurement of coal was eight feet, nine inches at this point. That is the aggregate of the two. The total was eight feet and nine inches. That is all one bed, but I simply for convenience in operation, did not remove the entire length of coal on the floor there but the measurement of eight feet nine inches represents the measurement of the bed itself at that point. The total thickness of the coal at Station 40 on the top bed, at this point, and for some distance on either side of this station coal blossoms were very prominent, lying on this massive white sandstone and at Station 40, by the construction of an open cut eleven feet in length, the bed had exposed to view a width or thickness of three feet and six inches. The thickness at Station 10 and 10a and R′ I have given before, those being the openings that were exposed when I first made my visit. Then at Station 42 in the
112 northwest quarter of the northwest quarter, the fourth bed, considerably higher than either of the lower three beds and quite well up towards the base of the Castle Gate sandstone, was opened by an open cut. The total length of this open cut was eighteen feet and the total thickness of the coal exposed by such work was six feet and three inches. The full thickness of the coal may possibly have been a little more at that point as it was still appearing; I did not secure the solid formation in the roof, so that the thickness of the coal may be a little greater at that point; and coal was also opened on this same horizon at Station O, the thickness at that point being something like six or seven feet. Its exact measurement being a little difficult to secure at that point. At this station 43 an opening was made upon the coal, this opening being located at this point because of the fact that the coal blossom was very prominent in the soil at that point. At that station 43 the slope of the hill being rather moderate an open cut was driven seventeen feet in length and then a crude tunnel was extended another six feet, giving the face of coal with a thickness of three feet, nine inches.

Then at Station 39 on the lowest bed, an open cut and incline tunnel was driven into the hill and the measurement of the thickness of the coal at that point was nine feet, eight inches; that is on the fourth bed, it is six or seven feet.

That was immediately below station 39 in the southeast quarter of the northwest quarter of Section 32. I neglected in reference to station 42 and station O, I believe, to state that coal blossoms were disclosed before any work was performed. In fact at station 42 in the side of a little gully a portion of the coal in place was opened to view, something like a foot or fourteen inches of a bed being exposed.

Then at Station 29 an open cut was driven on the lowest of the three beds, the position of the opening being determined by the finding of the coal blossom on the white sandstone. The length of this opening was about something like ten or twelve feet and the coal measured at that point six feet two inches.

113 The actual measurement is 6.1. That is the lowest bed. At Station 7 on the same bed, an open cut was driven into the hill a total distance of twenty one feet, not all of the coal being removed from this entry twenty one feet in length. This point was indicated to the men as the point for an open cut in view of the fact that there was a very strong exposure of coal blossom; and the thickness of coal, as determined by this opening at this point was eight feet and about seven inches. At Station 26 on the same bed an open cut was driven twelve feet into the hill, which displayed the bed to have a thickness of seven feet, nine inches, and at this station 26 there was a little gully draining to the southerly down the hillside and some two or three feet of the bed in places was actually exposed to view. For that reason it was taken to be at a favorable point for the construction of an open cut. Then at Station 38, in the northeast quarter of the southeast quarter, an opening was made upon the lower bed, which consisted of a cut about fifteen feet in length; not all of the coal being removed from the entire length, but the cut being constructed in benches in the coal and the bed at this point measured nine feet one inch. This was also located as the result of finding the coal blossom at this point. Station 37 on a high bed, higher than the other. As to the identity of this one I cannot be sure of it, but I think it was higher than either of the three lower. It is possibly in the position of No. 4; it is about that horizon. At this point an open cut constructed in view of the fact that the coal blossom was here observed, was driven about six feet into the hill, about two feet in width, at this point showing the coal

to be two feet four inches and a little shally streak near the top so that I have identified it on the map as being two feet of coal. At station 41, in the northwest quarter of the southwest quarter, a high bed at about the horizon of what has been termed the fourth bed, was opened to view by a cut located in view of the presence of
114 coal blossoms at that point. This opening was driven into the hill and showed coal of a thickness of twenty inches. Then at Station M—I am not sure but what I have covered that before, but there was a natural exposure of about three feet in thickness. That was Station M. It appears a little to the west of the north east corner of the section about three feet, about three feet of coal appearing there. Then at Station N, just east of the east boundary of Section 32 and a quarter of a mile north of the east quarter of Section 32, there was an exposure of coal in an old prospect. The exact measurement I do not have, but which was as I recollect it something like six or eight feet. That was the lowest bed. These are the particular points at which I have observed the thickness of the coal. Taking into account the total acreage of the section, approximately about five hundred acres of this land which lies back from the outcrop of the lowest bed of coal is that which I should designate as coal land. The total thickness of the four beds of coal would be about twenty eight feet. I made an examination of the adjacent territory. I examined Section 29 and also over in Section 31 and section—well, to a slight extent in the section immediately south of Section 32, and of course in Sections 33 and 34 to the east of this section towards the valley. In section 29 the coal has been exposed to view in a number of openings. There was, at the time of my visit, extensive mining operations being prepared for in Section 29. Aside from the actual openings of coal there was also some points that I observed the presence of coal blossoms and the existence of the coal formation in that section was also indicated by the presence of the prominent sandstone ledges, which are markers in the formation.

Answering what preparations for extensive mining I observed well in Section 29 at what I was told is now
115 known as the post office of Hiawatha, extensive operations were being prepared for and were being conducted by what I think was known as the Consolidated Fuel Company. These people were opening up some old workings upon the coal at this point and were constructing buildings in the preparation for the actual mining of coal, and there was being constructed at that time a railway spur to this point from Price, some twenty-two or twenty four miles distant. The Consolidated mine, or the mine of the Consolidated Fuel Company is about a half a mile north of the north boundary

of Section 32; it may be a little further. I made it a point to inspect those beds at those points. In Section 29 I inspected openings on four different beds. On the lower bed there were a number of openings. The coal measure in four different points on this bed in this section 29 respectively twelve plus feet—that is the total exposure was not there to be seen; sixteen feet three inches; twenty three feet at another point and fourteen feet at the fourth point. The highest bed, that is corresponding to the highest bed on Section 32, measured at one opening in Section 29 in the vicinity of the mine, six feet seven inches. Above this bed two smaller beds were examined and found to be of a thickness of two feet and one foot six inches, respectively. Another opening in Section 29 corresponding about to No. 3 in section 32, gave a measurement of six plus feet.

As to the extent of the entries which had been made at the time I made the examination, I have not the exact length of those openings at the mine of the Consolidated Fuel Company, but I recall at one mine, one opening went back into the hill several hundred feet, I would say probably four or five hundred feet, and others at this point that I have described in Section 29, were shallow prospects back into the hill. There was a second tunnel in Section 29 on the high, or No. 3 bed, which extends back for an appreciable distance but the exact distance I do not recall. The direction of those beds, those tunnels is about half a mile.

116 These extensive workings are separated from the beds of coal in Section 32 by a distance of half to three quarters of a mile. The separating topography between the two points you have a high ridge; that is, over in section 29 the coal formation is exposed as the result of erosion of one branch of Miller Creek, and then in Section 32 you have the same coal horizon exposed by the erosion of this other branch of Miller Creek, and between the two the topography consists of a high ridge; that is, as you go from the openings in Section 32 over into the openings in section 29, you rise from the coal horizon high onto the hill and down again into another canyon on the edge of the same coal horizon. If a body of men operating in a tunnel starting at a point in Section 32, and another body of workmen continuing in the tunnel in Section 32 were given a direction according to an instrumental survey; that is, if the mine workings from section 29 side were to drive directly toward the men working from Section 32 side they would meet.

On the other section adjacent to Section 32, I found veins of coal as follows: In section 31 the surface occupies the elevated or plateau land high above the coal formation, and we

did not find exposed to view at the surface in section 31 the coal. The same applies with reference to that section immediately south of 32; then in section 33 immediately east of 32 the coal formation at the surface of section 33 includes, or lies across the coal formation, and while I have not especially examined the surface in that section for the existence of the coal blossoms, at the same time the existence of the coal formation in the section was observed; the heavy marked sandstone being very prominent and easily recognizable.

I have not been up in Huntington Canyon. At a rough guess I would say between the west boundary of Section 32 and the bottom of Huntington Canyon was a matter of possibly three or four miles. From personal observation I know of coal in the branch of Huntington Canyon,
but it is a matter of common knowledge
117 that there are many exposures in it. I know that the
coal horizon extends along the frontal of the cliff and I have seen coal running back up into Huntington Canyon. I have two photographs which I took representing the locality. The photographs are [macked] for identification Exhibit C, J. W. C. To describe them, Exhibit C. is a photograph taken by me standing on a ridge shortly east of the east quarter corner of Section 32, township 15 south of range 8 east, and looking easterly towards the valley, showing the characteristics or features of that portion of that country. The sand stones formations are very prominently shown in the left portion of the creek and the nature of the slope from the creek up to and across these sandstone ledges. The upper prominent ledge is what is known as the Castle Gate coal floor. This was taken from a point just shortly east and slightly north of the east quarter corner of Section 32, and looking easterly; it was taken because it showed the typical [characteristice] of the country in which this section 32 is situated. I took it myself. It is a true representation of the ground as it appears there. The other one marked Exhibit D, was taken from this same point and shortly northeast of the east quarter corner of Section 32 and looking westerly onto Section 32 itself. Essentially all of the land in this photograph is within the bounds of Section 32, just a small rim at the top of the picture being beyond the west boundary of 32 and over in 31. This shows more prominently the right branch of this fork of Miller Creek, which appears in section 32. It also shows quite prominently towards the top of the plateau the appearance of the Castle Gate sandstone, which is shown on Exhibit D, by the heavy red dished line. I can mark on the exhibit just where one of the section corners appear in the picture. It is marked northwest section

corner in Section 32. This dot represents the position of the northwest corner of this section 32.

118 Cross-Examination

I received the degree of A. B. at Standord University, embracing both scientific as well as literary departments. If a man is a graduate of the civil engineering department or mining department, he gets the degree of A. B., the same as a person who studies Greek or Latin, practically a degree of Bachelor of Arts.

I devoted some time after graduating to city surveying. Before I went into the Government employ in 1905 I had made one or two, a few geological examinations in the field. I was connected at one time with Dr. Ralph Arnold, who was then the paleontologist of the Geological Survey, on work in the oil fields of Los Angeles; also assisted J. G. Brenner of Stanford University in the examination of some limestone deposits in the coast ranges of California. In 1905, the work at that time was mineralogical in character. It was the examination of mineral samples that were furnished to me for the purpose of determining as to their character. Classifying samples of minerals that were furnished to me. At first it did not include any field work, but while I was still connected with the survey at Portland I did do field work in the examination of placer deposits with relation to their character as mineral or non-mineral lands. Those examinations were in Wyoming, Idaho and California. I went in the service of the Land Department in 1907. Between 1905 and 1907, while I was still connected with the survey, and before I became attached to the land office, the field work not only included placer deposits, but an examination of lode deposits in New Mexico and Arizona, and in 1907 after having become connected with the Land Department I was assigned to the Montana District. I was with the Montana Division about four months. My work there was directed toward the examination of metalliferous deposits, both placer, lode and also the examination of coal lands. I could not specify the various sections of land that I examined, but I made examinations over
119 quite an area extending over a period of possibly three weeks in the field which was for the purpose of determining the mineral or non-mineral character of the land as a Government Inspector. After being in Montana I came to the Salt Lake Division, and since coming to Utah my duties have been to determine the mineral or non-mineral character of the public domain, irrespective of coal land, but including both coal land and metalliferous deposits, and I have worked I should say about one half of my time in making

such determination, and the other half has been devoted to field observation of coal deposits and office work. I examined the coal fields of Utah from the Colorado line as far west as Castle Gate. That portion from the Colorado line on around to Sunnyside, but in there the examination was only general in character. I have observed coal formation down at the Colorado line in this same field, and at various points between there and Castle Gate. My first coal operating camp was at Sunnyside. That was the first point where actual observations were carried on. I should say it is sixty or seventy miles, maybe more, between the Colorado line and the Sunnyside mine, and between those points I found the same formation, coal bearing formation that I did between Sunnyside and Castle Gate. But as I stated, I have not traversed foot by foot that entire district mile by mile. I do not know the exact distribution of the coal blossom, but I do know that coal is exposed in between those points. I know of no mine between those points of the magnitude of the Sunnyside mine. I know that coal has been extracted for instance in the vicinity of Thompson Springs. It does not [compate] in extent to that of Sunnyside. It is more in the nature of local banks, coal banks, and that at Thompson Springs is about fifty miles west of the Colorado Line. Between Thompson Springs and the Colorado line I did not observe any coal mine. So far as I know there has been no development between Thompson Springs and the Colorado line. I would not undertake
120 to state that there were not local openings in that distance. I cannot testify as to that country being coal land with the same degree of precision that I can of these other lands. I have made a geological inference in relation to that section. When I speak of the coal bearing formation I refer to that horizon in the rock where the coal is known to be commonly [prevelant] in this district, and I infer that when you have a geological horizon in which coal has occurred at one point that it ought to occur at another point along that same horizon. The section from the Colorado line to the west, to and beyond this section, is within the limits of the coal measures. There is no question about that. I traced it through that section lithologically. There is no chance for mistaking the formation. Were there no prospects at all between the two places, the formation could be traced, and from my scientific and geological knowledge of them no coal is visibly exposed within the coal bearing area. I am governed by the geological horizon in which the known coal occurs. My first examination of the land in question was made with Mr. Taff and Mr. Jensen in June of last year, 1909. I accompanied Mr. Taff and made a careful examination of the

exposures. At that time I recognized the three lower beds and one upper bed that I recognized at that time. I don't know what Mr. Taff discovered at that time. I cannot say whether he discovered all that I did. I recollect having seen some of the upper beds. Whether I was working at the same time as Mr. Taff, I do not know. I recall one place where we discovered a coal blossom, but Mr. Taff was two hundred feet ahead of me. He was not with me. I don't recollect whether I called his attention to it at that time; he was beyond me. What I mean by a coal blossom is finding these disintegrated pieces or remnants of coal in the form of dust and small particles of coal mixed up with the surface soil. Sometimes you find blossoms as a result of erosion. I stated that it was mixed
121 up with soil to a greater or less extent. Now some of these occurrences of the blossom was by a great—coal was very much in excess of the intermingled rock, part of it. It resulted from erosion to the large beds. Erosion has a tendency to remove it from its original position on the eroded surface. You may have erosion which will take coal particles down the hill, but the further it is moved the more it is intermingled and mixed with the detritus. The mere presence of coal blossoms would not necessarily mean that the coal was at the exact point of the blossom, and of course, it would not give any information as to the coal below that point. When I said that a blossom would remain there not only years, but for geological periods, I did not mean the identical particles of coal would necessarily remain there, but that condition remains the same. You would have collectively the same aggregation of coal particles during that time that the condition remained, but the geological condition remained constant, and that might be a good many years, speaking in terms of years. It would depend to some extent upon the amount of erosion and the amount of detritus coming from above; and it would also depend, of course, upon other characteristics, that is, of the [hil-] slope on which it occurs. It would also depend upon the amount of water or the presence or absence of moisture. All those things affect the existence or extent of the blossom it is to be expected that those same conditions would produce the same result in the past time that they are producing now, so that where you do find blossoms exposed at various points along the horizon now this locality it is most probable that such conditions or such [blossons] were exposed in periods a long time ago. I confidently believe that any [laymen] or yourself, if you were to go on that ground would be attracted by the appearance of this black material, these black

particles in the soil, and if you were so much interested
122 as to pick up any of those particles and look at them I believe that you would be very quickly able to determine that material as being coal, that it would be an indication, or should be an indication to you or to the layman that you were in the proximity of a bed of coal occurring in nature. I cannot say that a layman could determine with sufficient accuracy from the blossom that there was coal in commercial profitable quantities. It should be an indication to you and to the [laymen] of the presence of coal that would justify you in following that up, following up your indications to determine the extent of the coal itself. It would be an indication that would justify a man looking a little more carefully and going to a little trouble to determine just what the thickness of the coal was as was evidenced by the blossom. The blossom itself would not justify a layman in the conclusion that the land was more valuable for coal [that] for any other purpose under the law, but it would be a notice to whoever might be there that the coal was in close proximity, but as to the ultimate value of the coal beds, that, of course, is not directly proven by the blossom itself, but must be proven by further inspection or observation. It is likely that further excavation would be necessary. In order for the layman to determine whether or not a certain section is more valuable for some other purpose than it is for coal he would have to do some work there, actual work, to determine the amount and character and quality of the coal, and he would also have to give some attention to the distribution of its grasses or timber, or whatever else there was on the land. The timber and grasses would be observable to the layman, but it would require the use of that man's power of observation and reason before he would be able to show its value; and if he did not have the coal exposed in a natural face as sometimes occurs, it would re-
quire that he go to a little trouble and a little work
123 to open it up; but to the ordinary layman who has not timber culture, for instance, it would require also a little money and labor in determining as to the value of such timber that he had upon it.

The beds in Section 32 dip slightly westerly about two or three degrees, as near as I can estimate it. I did not observe any southerly dip to the beds, or southwesterly dip. The general dip of these beds is westerly, but the dip is very slight. It is possible, of course, that in small areas there might be a little variance in the direction of the dip. When I say westerly with refernce to the dip, it is possible that the dip is north of true west; but as I stated before, the exact direction, and

the exact measurement of that dip is very difficult to determine in the absence of precise instrumental computation. The most prominent and most reliable dip that I took was by an inspection of the Castle Gate floor as it occurred through the north part of the section. That really would be the only dip or the only exposure on which I base my statement as to the direction and magnitude of the dip. As to how many points on the Castle Gate sandstone I observed the dip, I may state that the ordinary determination of the dip by means of a clinometer at numerous points on the sandstone would not give the results with the same accuracy as the dip which I determined by an inspection along the length of that sandstone of something over a half a mile by the use of a clinometer, so that I did not make any specific clinometer determination of the dip on the sandstone itself, but by a distant view of the sandstone by the application of the clinometer to the inclination along the line of the outcrop. I did that for a distance of half a mile. The exposure there was something [line] a mile in length. I should correct myself there, I stated with reference to the Castle Gate floor. I think the testimony will show, and by that I refer to what is marked on this map, Exhibit B, to bed No. 3. The exposure of the outcrop of
124 this bed No. 3. Now, the Castle Gate Sandstone in contradistinction to the Castle Gate coal floor, does occur high above the coal series but the general characteristics of the strata in this section with reference to the dip and angle of dip and direction is likewise indicated by the outcrop of this Castle Gate sandstone. Of course, standing at a point on the sandstone you can see that sandstone in its outcrop as it practically encircles the section; you can see the uninterrupted manner in which it occurs and the general direction of its dip.

The coal blossoms which I observed at Station 23 was probably the fourth bed. With relation to that, I know that it is in the same or approximately in the same horizon, but due to the covering of soil between Stations 43 and 42 I was unable to trace it continuously between those two stations, and it is not marked by a prominent sandstone floor, so that there is little doubt as to its being one and identically the same bed at those two points. The elevation between station 42 and 43 is approximately the same. As I recollect it, I did not attempt to identify on Section 29 the same bed as this higher or fourth bed, but with relation to the three lower beds. The conditions are entirely different, and you can identify those at a point not far removed from each other, because of the fact that these lower three beds are intimately

associated with prominent lime stone ledges and markings. I am not entirely governed in the identification of the coal beds by the uniformity in thickness of the occurrence of the coal between two points, because you do find variations in the thickness of the various coal beds; but the prominent identifying features in this district are, as I have stated, those prominent sandstones. I believe the extreme difference in thickness in a bed in Section 29 and the same in Section 32 is 13 feet, but at that point the maximum thickness is not as much as in Section 29. This same bed shows varia-
125 tions. So that at one point they are comparatively close in thickness, while they show some fourteen feet of a variation of only four feet from that in Section 32. Speaking from memory, I found, as I stated, coal beds about eighteen feet thick on Section 29. I don't believe, as I recollect it now, that I have testified as to this bed being so thin as five feet at any point in those two sections. I testified one ten feet four inches in Section 32, and over in 29 there were thicknesses of twelve, fourteen and eighteen feet; and twenty-three feet. Twelve feet eight inches in thickness would be the maximum thickness; but you recall in that same bed on section 29 the coal occurrence there was only twelve feet, which was less than two feet from the exposure in Section 32. The exposure of coal made by me at Station 10 on Section 32 where I found the thickness of coal to be five feet, as I recollect it, that point has not been prospected or opened up in Section 29. I call that the middle bed in Section 32. The middle bed in 29 has not been prospected, but there are some indications of it there. At Station 10-A on the third or top bed, the third bed in Section 32, you will find coal six feet six inches thick. The corresponding bed according to my testimony in Section 29, the measurement at one point was six feet seven inches, and the second point was six feet plus, a little over six feet. The lowest bed, No. 1, in Section 32, corresponds to the bed in Section 29; that I found to be eighteen feet. In that case there was a difference of some six feet in thickness between those two beds. The same bed in Section 32 corresponds to the fourteen foot thickness found in 20, and twelve the same. I spoke of finding two occurrences of coal higher up on Section 29. The next one, this fourth one, was two feet, and above this, shortly removed therefrom was the fifth bed of one foot, two inches. There are several higher beds above these lower beds, and more than two feet thick. I found others in Section 32 in the northeast quarter of the northeast quarter of the section up above the
126 beds, there are, as I recollect it, probably as many as three exposures of upper coal. Those coals, according to my best recollection, range in the neighborhood of eighteen

inches to two feet and one half in thickness. As to whether or not in determining the mineral or non-mineral character of land where I [fould] coal bed one foot and two inches to eighteen inches thick, and whether [ot] not I would return that land as mineral land, would depend upon the circumstances in each particular case.

Taking the occurrence of coal that I found at Stations 42 and 43, and Station M, as an inspector of coal for the Land Department for the purpose of classifying the land, I would not return Section 32 as mineral for the reason that this coal is high on the hill side and the great majority of the surface area of 32 lies wholly below this coal bed, and of course, if this line was considered this other land could not be considered as coal land. A great deal of Section 32 would be below the occurrence of coal at Station 37, both geologically and topographically. I did not mean to state that these stations did not reflect upon the character of the land. These exposures do reflect upon the character of that land, because they give evidence as to the presence or formation of the actual coal itself and they are of importance. They are of importance in determining the character of Section 32 as to being coal land or otherwise. At Station 42 coal of the thickness of six feet and three inches was opened up. That has a direct bearing from the northwest quarter of the northwest quarter of Section 32, because from that occurrence it is known that coal underlies a portion of that forty acre [track], and the same applies with relation to the coal at Station 43, as well as at Station 41, and as well as at Station 47, and, of course, as I stated before the entire Section 32 could not be classified solely as coal from the existence of this one bed, because a great portion of the section lies below the
127 horizon of this bed I would classify part of it as coal land from the development of one foot and eight inches of coal at stations 41 and 42. There is an exposure of three feet nine inches at Station 43, and knowing the condition on this particular forty and the evidence would show the existence of coal, these thicknesses on these two forties and those portions of these forty acre [tracks] back from the outcrop can reasonably be stated to contain coal beds, and for that reason I think they would be classified as coal land. Taking the northwest quarter of the south west quarter of the section having the occurrence of coal that I have testified to of one foot eight inches, I would define that forty acres of land as being more valuable for coal than for any other purpose, and classify it as mineral bearing coal land. Answering the question as to whether or not the coal beds would be commercially profitable,

I will say, in that relation, of course, a bed of that thickness will not be worth much when coal in beds of so much greater thickness are immediately in the vicinity, but so far as the mechanical operation of mining that bed of one foot, three inches, in the absence of other beds in that immediate vicinity, I am of the opinion that the production of coal, the cost of production, would not be so excessive as to make impossible the working of the bed. That would, of course, depend altogether upon the question of supply and demand.

Q. I want your judgment as a Government employe and doing impartial justice, or endeavoring to amongst the citizens of the United States and of the several States; if you should find a forty acre tract of land with coal on it one foot and eight inches thick, you would return that as profitable commercial coal land, would you.

A. That is, such classification or such thicknesses of coal are [reco-nized] among the authorities as still being within the limits of workability.

128 Q. I am not asking you that. I am asking you what you would do as an employe of this Government.

A. Understand me, that I do not attempt to state that such a bed of such a thickness can compete with the other beds in that immediate district but I am free to say in the absence of these other beds if there was a demand in the vicinity for coal, without question a bed of that thickness could be worked.

I do not know anything about the condition of that section in 1894, 1895 and 1896 so far as personal observation goes. I was not on there at the time. I have based my conclusions as to the coal bearing condition or quality of the land from the observations which I made of the openings which I saw upon the land and on adjacent land at the time of my examination. I was not upon the adjacent land prior to 1909. My conclusions as to the character of the land are based upon excavations made under my direction and the excavation and exposures artificially made theretofore on that section and other sections and from my technical learning as a geologist, and from general observations in the district. There are limits to all coal beds. At some point and some place that ten foot bed must pinch out, and in answering counsel this morning that if a body of men were driving in coal on the same horizon, and another body of men were driving toward each other, that they would meet, I did not claim as a mathematical certainty that they would meet in coal all the way, or be in coal all the way. The evidence as I observed it justifies the conclusion that if the work from these two points was continued along surveyed lines, that is, so that they would not pass in going in that same direction, that they would not only meet, but they would continue in coal between the two points. As to the

exact thickness I am unable to state, but as to the average thickness we can quite confidently state that it would be,—the average would be at least at all times, at least the thickness as exposed for instance in Section 32. In order to be conservative, although I
129 do not say that the average thickness in Section 29 was twenty three feet, I made the statement that it would probably be at least as thick as that portion in the bed in section 32.

That conclusion is based upon geological deductions, of course because there is no such actual opening extending from one section to the other. My conclusion as to the average thickness depends upon deductions made by me as an expert and from actual observations of these two particular sections.

Q. If the blossoms of coal, about which you have already testified, were sufficient at the time of your examination last year to induce and cause the ordinary layman not conversant with geological occurrences to arrive at the conclusion that this was coal bearing land, why it was essential or necessary in your judgment, to do all the openings and go to the expense of making the cuts about which you have testified?

A. That was simply in furtherance of the conditions as I had observed and I had reason to believe would be shown by such openings, and such openings were actually made simply as a matter of proof as a justification of those opinions on that matter.

Q. The openings were made in an effort on your part to render certain that which thertofore was purely speculative and uncertain, was it not?

A. No; not entirely so; that is not quite correct. It was made for the purpose of giving more definite information concerning those facts which were indicated by the blossom. That is, the thickness, the actual thickness of the beds at those points. As I have stated before, the occurrence of blossom is not positive proof as to the thickness of the beds, of course, and as I have often stated coal beds do vary to some extent in thickness. So that the actual opening was made for the purpose of determining definitely the particular characteristics of the bed at this point and the existence of the bed was indicat-
130 ed beyond doubt to a competent observer and a layman, even at those points where the blossom was found.

What we did was for the purpose of specifically opening to view to anybody who desired to see, and to show to ourselves the actual measurement of the thickness of coal, the exact thickness of which was unknown as to those particular points. The occurrence of blossoms would not indicate whether coal beds are of many inches thick, or not. As a matter of fact in

this district, particularly on this section, the occurrence of the coal blossoms are such that you could form some estimate as to the thickness of the bed as compared between one and two inches, and to a number of feet. There is, to some extent, evidence in a blossom, the occurrence of a blossom, as to the thickness, but it is not, by any means, conclusive. That is what I meant to say. I caused the work to be done. I was acting under the direction of the chief of the field division George E. Hair, of the General Land Office. I do not know who made the request for me to do the work. The work was done by myself and under my direction, but the expenses of the men whom I had employed, I understand, and in fact I know, were paid for by the Department of Justice.

The vertical distance between coal bed No. 4 and coal bed No. 3 is, from memory, something like three or four hundred feet.

Q. What horizontal distance does your section purport to represent?

A. The section on the left of Exhibit B represents sections from A. to B. and to C along that line.

Q. Where is Station 10? (Witness points).

Q. How far are stations 10 and 10-A projected on the plane of the section?

A. The section a-b-c passes essentially through station 10 and station 10-A.

Q. Notice that your map indicates that they are projected to the plane?

A. Well, that was because the two stations may not be exactly in the line.

Q. In the plane cut by the section. A. Yes.

131 Q. But how far they are projected you don't know?

A. Well, not exactly but that would be a matter of just a few feet.

Q. Station R′ is projected how far westerly of the plane of section?

A. Well, that would be only a matter of say a hundred feet, something like a hundred or a hundred and fifty feet.

Q. And is it projected—a distorted projection I mean? Is it projected north or south or northerly or southerly upon the plane of section?

A. Well, whatever distortion there is, is very slight, that is the idea of the section was to show approximately the relative positions of Stations 10 and 10-A and R′.

Q. Is Station R′ projected to the plane passing through these two points? A. Yes, sir.

Q. But whether it is a distorted projection—if it is you say a very slight? A. Yes, sir.

Q. So that the section would show with practical certainly the position of R′ projected to the plane?

A. Yes, sir; for all practical purposes.

Q. The scale is twenty feet to the inch?

A. That refers to the section.

Q. That is the only station where the occurrence of coal is projected to the plane of section there and is cut by the plane of section, as I understand you?

A. Yes, sir; station 39 is on the plane.

Q. It is cut by the plane of the section?

A. Yes, sir.

Q. What is the distance between the portal of coal bed No. 1 on opposite sides of the canyon there. What is the horizontal distance between Station R′ for instance, and the portal on the opposite of the canyon here?

A. That would be about 140 feet.

The difference in the thickness of coal at those two portals is the difference between ten feet four inches and nine feet eight inches. On the section the dip of the beds is not to
132 the westerly. They are drawn as horizontal. They were meant to be horizontal because they were approximately on the strike and on the dip. In my estimate of five hundred acres of this section being underlaid with coal, the particular portion which I eliminate is the portion on the map colored in yellow. That lies below the lowest coal bed. We have no exposure of coal blossoms or otherwise on the southeast quarter of the southeast quarter. I returned that as coal land on a geological inference merely. From a geological deduction. I know of no exposure of coal blossoms or otherwise upon the southwest quarter of the southwest quarter. That is returned as coal land by reason of a geological inference; or geological deduction. There is no exposure of coal by blossom or otherwise on the southeast quarter of the southwest quarter of the section. That is returned as coal land or classified by me as coal land from a geological inference merely. Those four quarters are all so classified and returned as a result of evidence of coal in the district, and from geological deductions. As to the classification of the south half of section 32, it was based entirely upon geological inference, plus development that I caused to be done there, and development that had theretofore been made at the time of my general observation.

Q. That is from your general geological deduction. And the only exposure of coal, by blossom or otherwise, that you have in the northwest quarter of the southwest quarter of the section, is, as testified to by you, at station 41, where you have opened, by work done last year and determined the coal bed one foot and eight inches in thickness—that is all from your geological deduction and general observation.

A. No, the blossom is exposed in other places on that section near station 41, but not directly at 41.

133 Q. Well, practically at station 41 and in the immediate vicinity. That is practically true?

A. Yes, sir; practically true.

Q. And your answers would be the same as you have given with regard to the south forties aside from—

A. Yes, sir.

Q. From actual blossoms and development which you have caused to be done, and that was also true of the south west quarter and the northwest quarter of the section, was it not?

A. Yes, sir; with this exception, that blossom is shown on this forty at other points than merely section 43.

Q. In the vicinity of Station 43.

A. Yes, sir.

There is no exposure of coal on the southeast quarter of the northwest quarter of the section, except such as I caused by development to be exposed, and I say it is coal land from a geological inference and deduction as an expert. There

134 were blossoms exposed along in the vicinity of Station 39. As to the northwest quarter of the northeast quarter of section, we saw no opening on this forty at the time of my visit, but there was a blossom of coal; and this is also true as to the northeast quarter of the northeast quarter of the section. It is also true of the south east quarter of the northeast quarter. There were no prospect openings on this forty; but there was an exposure of blossoms. There was no prospect opening upon the southwest quarter and the northeast quarter aside from the exposures of the blossoms. I mean the blossoms which I have testified at that station were in the immediate vicinity. In the northeast quarter of the northwest quarter of the section there was the natural exposure of the beds themselves. There was not only the blossom, but an exposure on the bed itself. There were one or two instances where a small water course had exposed the bed in places, and [particular--] at Stations 26 and 13. I don't know when the exposure was made by the water course running through that Section. I could not state as to whether it was made in the spring prior to my visit or

not. With those exceptions the answer I have given to the last number of questions will apply to all of the quarters on the section, except where I found the tunnels in the northeast quarter of the northwest quarter of that section.

The kodak picture marked Exhibit C, I should estimate was taken at a point about five hundred feet from the center line of the section. It was taken looking in a direction opposite from Section 32. In other words it was taken from a point five hundred feet from this quarter section corner looking to the east down the canyon. It does not show any part of Section 32, but it does show the characteristics of that country to the north of Miller Creek and which does extend opposite and into 32, but the portion shown in the picture does not include anything in 32. I could have taken the picture northerly and a little westerly of the division, but it
135 would not illustrate so well the relation of the ledges of sandstone around the slope, because you would be looking directly toward or into the hill, whereas, in the picture that I have taken you have more of the profile.

Exhibit D was taken and the camera was pointed in a general way in a westerly direction, and it displays that part of Section 32 occupying in part the northwest quarter, and the other land in 32, probably the northwest quarter. As to those pictures being taken for this lawsuit, I don't recall whether I particularly expected they would be used as exhibits, but they were taken during the course of the examination when I knew there was a lawsuit on. They were taken in the line of my duty, I did not develop them myself. It was done at my instance.

Redirect Examination

There are four southern forties of the section, which, so far as I know, show no occurrence of coal on the surface, not even to the extent of blossoms. [There] covering is more pronounced there, and the likelihood of finding blossoms would be correspondingly minimized. I have classified them as coal lands in my opinion, and they appear upon the map as coal lands. That was a result of my geological deduction, and personal knowledge of the field.

The characterization of these four southern forties as coal land, is based upon personal knowledge of the existence and extent of the coal beds within the coal formation within section 32, section 29 and the vicinity and from a knowledge of the characteristic of coal of this formation in this district and for instance the evidence within section 32 itself proved the existence of at least three prominent, strong beds of coal.

The extent of these beds over an appreciable area and the geological examination indicate the absence of any recognized conditions which would cause an end to the extent of those beds. From the result of the inspection of these coal beds in this section and vicinity and from general knowledge as to the characteristics of coal in the district and from
136 knowledge as to the continuity of the [enxlosing] sandstone formation, the geological deduction is made and appears to be wholly reasonable, that the coal does, as a matter of fact, exist beneath each and all of these southern forty acre tracts.

There are three prominent beds exposed on the border of Miller Creek within Section 32, and at least three beds found to exist between these particular forties. The outcrop from these forties would be at one point near the center of the south half of the section. The outcrop should extend within at least the south east corner of the southwest quarter, and the southwest quarter of the southeast quarter. As a matter of fact they do extend as I stated before. The actual opening of the coal upon these outcrops was not made because of the extra labor and time it would be required in actually locating the position of the beds,—the edge of the beds. The opening at Station 10-A and R′ are one half [mole] north of the northeastern boundary of these four southern sections. The openings at Stations 26 and 29 are less than one quarter of a mile of the north boundary of these southern four forties, and the coal opening at Station 37 is less than one eighth of a mile north of the north boundary of the southeast quarter of the section.

I speak as a geologist and from particular examination in the field. As to those veins pinching out, I know of no such evidence that would even intimate that these beds ceased in their continuity between the known exposures and the south tier of forties. On the contrary such evidence is at hand tending to prove the continuity of the coal beds beneath the particular forties. From a study of the conditions as I found them in this section and [and] the neighboring lands, I should consider a man to be prudent if in the extension of his mining operations he were to count upon the south four forties as containing workable, valuable coal. As to the likelihood of the continuation of the coal vein that I discovered in the other forties, as the result of uncovering coal at the
137 points on Exhibit A, I would make the same answer as to such other forties.

Said photographs were marked respectively "Exhibit C, J. W. C." and "Exhibit D, J. W. C." and are returned herewith into court as a part of this report.

EDWARD D. DUNN, a witness produced by the complainant being first duly sworn, testified:

My name is Edward D. Dunn, Residence 114 F. Street, age thirty four, occupation clerk in the United States Land Office, at Salt Lake City, Utah. I have been a clerk in the United States Land Office, Salt Lake City, since December 16th, 1902. We have records in the Land Office showing the tending to show the character of the lands in Section 32, Township 15, South of Range 8 East. I have the records with me, taken from the files and records in our office. I am a clerk in the office charged with the custody of those papers. I brought them on instructions from the Register of that office. The letters which I have handed to you refer not only to the lands in question, but to a large number of other lands.

Mr. Ellis: I object to it; I object to the witness reading any part or portion of any statement, deduction or conclusion in a letter passing between the Department officials at Washington and the local Land Office, as being incompetent, irrelevant and immaterial, and not binding upon the defendant in this suit; and upon the further ground that they are records of an office and of officials of the Department of the Government whom the defendant in this suit has had and can have no opportunity to cross-examine to test the accuracy of the reports and adjudications ex parte of the Government officials.

138 (Reading).

"N"

CWA H. G. P.

Department of the Interior
General Land Office,
Washington, D. C. July 3, 1907.

Address only the
Commissioner of the
General Land Office. Coal Lands Classified.

Register and Receiver,
Salt Lake City, Utah.

Sirs:

I schedule below and enclose maps as provided by paragraph 6 of regulations under the coal land laws, approved April 12, 1907.

The land marked "Non-coal lands" lie without ascertained coal areas and are open to entry under the general laws according to the character of each particular tract, and you will stamp on the tract books against these lands the word "Restored" so that the notation will read "Restored coal lands", as explained in circular instruction of May 3, 1907.

The lands marked "Coal land $75 per acre", "Coal land #50 per acre" "Coal land $30 per acre," "Coal land $25 per acre" and "Coal land $15 per acre", may be sold under the coal land laws at the prices fixed respectively, subject to existant rights as defined in circular instructions of May 20, 1907, subject to the statutory price of $20 per acre if within fifteen miles from any completed railroad.

The lands marked "Not sectionized" are not restored, but remain withdrawn from disposition under the coal land laws except as provided in circular of May 20, 1907 for the
139 recognition of existent rights.

Schedule.

All Salt Lake City Principal Meridian.

Coal land $50 per acre—withdrawn land.

South half section 32.
North west quarter section 32.
North half of north east quarter of section 32.
Southwest quarter of north east quarter section 32.

Mr. Ellis: Does that take in the entire section?

Witness: No; there is one piece left out.

Witness: (reading) Non-coal land—withdrawn lands.
Township 15, south of range 8 East.
Southeast of the northeast of section 32.

Very respectfully

FRED DENNETT,
Acting Commissioner.

Board of Law Review
By H. J. Gray.

"X"
J. J. C.
PJA

CCH

Department of Interior.

General Land Office,
Washington, D. C. March 24, 1908.

Address only the
Commissioner of the
General Land Office

Lands Classified.

Register and Receiver,
Salt Lake City, Utah.

Sirs:

I schedule below and enclose maps as provided by paragraph 6 of regulations under coal land laws approved April 12 1907.

140 The lands marked "Non-coal lands" lie without ascertained coal areas and are open to entry under the general land laws according to the character of each particular tract, and you will stamp on the tract books against these lands the word "Restored", so that the notation will read "restored coal lands", as explained in circular of instruction of May 3, 1907.

The lands marked "Coal lands $15 per acre", may be sold at the price fixed if more than fifteen miles from a completed railroad at the time of purchase; if within fifteen miles of such road, at $20 per acre; and lands marked "Coal lands $20 per acre" (or higher price), may be sold under the coal land laws at the price fixed, subject to existent rights as defined by circular of instructions of May 20, 1907. Township 15, S. of Range 8, East.

SW¼ of NW¼ of sec. 32, coal land $25 per acre.
W½ of SW¼ sec. 32, coal land $25 per acre.
SE¼ of SW¼ sec. 32, coal land $25 per acre.
N½ of N.W.¼ Sec. 32, Coal land $50 per acre.
SE¼ of NW¼ sec. 32, Coal land $50 per acre.
NE¼ of SW¼ sec. 32, Coal land $50 per acre.
N½ of NE¼ sec. 32, Coal land $50 per acre.
SW¼ of NE¼ sec. 32, Coal land $50 per acre.
SE¼ of Sec. 32, Coal land $50 per acre.
SE¼ of N.E.¼ Sec. 32. Non-coal land.

In any discrepancy existing between this and any previous letter you will be governed hereby in any case arising on and after this date.

Very Respectfully,

FRED DENNETT,
Commissioner.

Board of Law Review
By E. C. Finney."

141 I have the plat book with me also which contains the township plat of the township in question, and the section in question. The designation of the plat is No. 11½ Southeast. It is not paged or numbered. The plats mentioned in the two letters which I have just read will be found attached to that plat. The plat of the Surveyor shows that the land was returned as coal land.

Mr. Ellis: I move to strike out the testimony of this witness as incompetent and for the reason that the defendant has no opportunity to cross examine the alleged testimony offered through the mouth of this witness, as coming from third persons, on the ground it is purely hearsay and not binding upon the defendant in this suit.

Mr. Maynard: The answer to that is, as I said, that Mr. Dick, the witness who says he made the survey, has been called as a witness and has testified and been cross-examined by counsel. This is offered for the purpose of showing that the surveys which he made were approved and have been of record in the office:

Q. Since what date. A. Since June 11, 1902.

My Maynard: Since June 11, 1902, which has been open for inspection of the public and was open at the time for inspection by anybody who was interested, from that time on.

Mr. Ellis: I made the further motion to strike it out, upon the ground that it is needlessly encumbering the record with something already in evidence according to the statement of counsel, and further upon the ground that there is no offer of the plat or certified copy of the plat into this record for examination or inspection by counsel for the defendant.

Mr. Maynard: I will say in reply to that, that this is an official record of the United States, which cannot be taken from the office and must always remain in the custody
142 of a representative of the office and that as a part of the complainant's proof we will have a certified blue print copy made of the plat in accordance with the rules for the introduction of the same in evidence.

Mr. Ellis: When the plat is offered, it will be time enough to meet that question, when it is offered. You don't offer anything, as I understand, of the records now; the witness has been merely requested to read something from the record.

Mr. Maynard: I offer in evidence, as a part of the complainant's proof in this case, the Departmental letters received by the local Land Office, which have already been read into the record by the witness, and I now formally offer the same in evidence, together with the notations, and say, that because of my inability I cannot now offer the original plat in evidence, but I will, as soon as possible, cause a certified copy of the same to be prepared and offer it.

Mr. Ellis: We object to it upon the ground that it is incompetent, but we do not make any objection on account of the inability of counsel to offer the original record, and consent that a certified copy of the plat may be substituted for the original, not waiving our objection as to the competency, materiality or relevancy of the testimony offered.

Mr. Maynard: I see that on the 8th day of June last, on general page No. .... in answer to an objection made by my brother Ellis, I state that this is the official record of the United States which cannot be taken from the office but must always remain in the custody of a representative of the office, but that as a part of the complainant's proof I would have a certified blue print made from the map in accordance with the rules of such matters for the introduction of the same in evidence. Now, since the adjournment we have found that we are unable to have a blue print made from this map
143 which is on file in the Surveyor General's office, the original map, and I have sent to Washington for the purpose of getting a photographic copy of the map and the reply was, that the stock had been exhausted and that it could not be furnished. Now, it will cost about twenty dollars to make a certified copy of this map; and under the circumstances I do not think that it is necessary to put the Government to that expense, to make this proof, as it has already been shown by the testimony of Mr. Dick, that the lands in question were returned by him as coal land, and from the testimony of Mr. Dunn of the local land office, that the copy of the Surveyor General's map on file in his office shows the same fact, which I understand is treated as of the three originals which are made. I now produce the original map, or the original plat book in the custody of Mr. Andrews from the Surveyor General's office, and ask that he be sworn.

ALLISON G. ANDREWS, a witness produced by the complainant being first duly sworn, testified:

Direct Examination.

Mr. Ellis: Before Mr. Andrews is interrogated I wish to state in reply to the statement of counsel for the Government, that it is no excuse for the non-production of a certified copy of a Government record, if it be competent for any purpose, to fail to produce the same because the Government is too poor to have such a certified copy made; that the rules of evidence require, when an original is not offered in evidence that a certified copy shall be produced in lieu thereof and offered in evidence, and that the failure to produce cannot be justified because the litigant does not desire to go to the expense of producing such a certified copy.

Mr. Maynard: I say in reply, of course, if I thought it was absolutely necessary to make the proof, and the proof could only be made by the map itself, why I certainly would have had it made, but I think that the proof that I offer is
144 competent proof of the fact that I seek to establish and therefore I am not willing to put the Government to any unnecessary expense in getting it.

My name is Allison G. Andrews, fifty-two years old. I am chief of the Mineral Division of the Surveyor-General's office My residence is Salt Lake. I have been an employee of the Surveyor-General's office about eleven years. I have with me book 43 of township plats representing the field notes of surveys made, of agricultural surveys in this state, some of them. It is in my custody as a representative of the office. Page 50 of this book represents a plat of Township 15, South of Range 8 East, of Salt Lake base and meridian as surveyed by James C. Dick, under Contract No. 233, dated November 24, 1899, and approved by Edward H. Anderson on November 2, 1901, this plat having been made from the original field notes filed by Mr. Dick in that survey. The map was made from notes which were filed on January 14th, 1901. In as much as the map was made from those notes, I suppose it became a part of the records of the office at the time of its approval by the commissioner of the General Land Office. The map itself was made in the Surveyor-General's office from notes made by Mr. Dick. It is approved by the Surveyor General, Edward H. Anderson on November 2nd, 1901, and was approved by the Honorable Commissioner of the General Land Office by his letter "E" dated March 5th, and June 6, 1902. That map was made in triplicate. One was sent to the Commissioner of the General Land Office, and one filed in the office of the

Register and Receiver of the local United States Land Office, and the other copy is on file in our office.

I will read a few notes of Mr. Dick:

This volume of field notes is Book A, No. 274, on page 342, Mr. Dick in his description of this township says: "This township is very rough and mountainous and it is best
145 adapted for agricultural purposes; the only tillable land being found along Miller Creek in the southeastern portion of the township; timber suitable for malling purposes is found only in the western portion of the township and consists of pine and quaking aspens. The remaining portion of the township is covered for the most part with a scattering growth of scrub cedar and [pinyon] pine. Water can be found in Willow Creek and a few springs scattered throughout the township. The tops and north slopes of most of the ridges are covered with an abundance of rich and nutritious [gra-ses] which furnishes feed for cattle and sheep pastured in the vicinity during the warm summer months. There are numerous indications of coal deposits throughout the township and in the following sections there are sufficient indications to warrant returning the same as coal land; viz; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 28, 29, 30, 32 and 34, the northwest quarter of section 3 and the south half of section 33. There are no other indications of mineral in the township. Melvin M. Miller has a ranch in the southeast quarter of section 37 upon which he has made about $500 worth of improvements in the way of fences, buildings, etc. On Deseret entry 1473 there are two saw mills and some buildings, in the northeast quarter of section 30, but they were unoccupied at the time of survey and owner is unknown. I was unable to find any trace of the following named settlers, reported to have deseret entry claims in this township, viz: George Wilcox, X. E. 1462; Luis Quinty, D. E. 1487 and John L. Price, D. E. 1665. James C. Dick, United States Deputy Surveyor."

There is a legend on the map showing the sections on which there is coal. It is a circle with a cross in the center. It appears in Section 32, and on the other sections referred to by Mr. Dick.

Cross-Examination.

The notes containing a general description of township
146 15 south of range 8 east which I have read from are the original field notes of Mr. Dick signed by him, and filed in our office. They were filed first and bound after-

wards. They are bound in our office after they are received there, As to the plat which has been marked as an exhibit and offered in evidence, and as to whether or not the plat was made from those field notes I cannot say. My testimony is based upon the record. The plat has been approved by the surveyor general as having been made from those field notes. I assume that the plat was made from Mr. Dick's notes because the Surveyor General's signature is on it.

Mr. Ellis: For the reason that this plat before us has not been offered in evidence and no certified copy of the same, or any other properly authenticated copy has been offered in evidence, we move to strike out all of the testimony of this witness, and no certified copy of the plat or notes from which the plat was made have been offered in evidence, and it is impossible to determine from an inspection of the plat whether or not the plat itself is correct or is the result of a correct platting of the notes of Mr. Dick, and I object to it for the reason that neither the court nor counsel, from the testimony so far in, can identify that plat or ascertain anything from it.

Mr. Maynard: The original plat is here for the inspection of counsel and I have offered the witness here the same as I did Mr. Dick and Mr. Dunn, for the purpose of cross-examination. You are at [perfectly] liberty to now cross-examine this witness and if there is anything wrong about this plat or this book or the field notes, counsel can have an abundant opportunity to bring it out now.

Mr. Ellis: It is an unheard of proceeding to produce a plat, although counsel may have opportunity to examine it, still they have had no opportunity to cross-examine the makers of the plat, and it would be wholly useless for
147 the court to consider any testimony so far offered, referring, to the plat, to a plat that is not before the court:

Mr. Maynard: We rest the case for the Government in chief.

(Defendant's Motion to Strike Testimony on Behalf of the Government.)

Mr. Ellis: I move to strike out all the testimony introduced on behalf of the Government, on the ground it is incompetent, irrelevant and immaterial, it appearing from the testimony and record in this case that section 32 is a section of land granted by the Government of the United States under the En-

abling Act to the State of Utah, and that in the grant as to the thirty-second section to the State of Utah, there is and was no reservation as to coal land or other mineral land, and there is nowhere to be found in the Enabling Act, in so far as any grant of the public domain to the State of Utah for school and other purposes, any reservation whatever of mineral, whether known or unknown, at the time of the grant; and that all the testimony given on the hearing of this case so far as a title to any land granted to the State of Utah in pursuance of the Enabling Act on the part of the plaintiff, is utterly irrelevant, incompetent and immaterial.

(Stipulation Waiving Signatures of Witnesses to Depositions).

Mr. Maynard: It is stipulated that the reading to and the signing by the witnesses of their respective depositions hereinbefore set forth, is waived.

Mr. Ellis: That is agreed to and the record may so show.

Defense.

Mark Hopkins, a witness produced by the defendant being first duly sworn, testified:

My name is Mark Hopkins. I reside on the west shore of Utah Lake, Utah County. I have resided in Utah over twenty years. Prior to that time, immediately prior, I lived in Wyoming. I am a Mining Engineer and coal operator. I have been engaged in the business of coal operating for about thirty years. I began coal operating first in Pennsylvania. I operated there about five or six years. I mean by a coal
148 operator my general occupation in that mine was assisting the engineer, the civil engineer, employed in making the mine surveys and that sort of thing. The first position I had in the coal mines was tipple boss, superintending its preparation, and within a year afterwards, or a matter of that kind, I was selected by our general manager to prospect the Pine Creek coal field in Pennsylvania. After that in the course of another year, the field in which we were operating was becoming exhausted, and we were casting about, or the company was casting about for a new field in which to place their endeavors, and they branched out in Clearfield County, Pennsylvania, and I did the field work there for them and the prospecting of that portion of the field which they afterwards bought, and upon which we opened six mines there in one field. I say that I had the position at that time in this new company of assistant general superintendent. Then when

I came west in 1886, I was under contract with the Union Pacific Company to act as their assistant General Superintendent. I mean when I went to Wyoming I was with them some two years or over in that capacity, and then developed what was called the Mark Hopkins & Company mine, a mine now owned by the Central Coal and Coke Company. When I was in Wyoming the Union Pacific had mines in Colorado, Wyoming and Utah, and they were all under my direction. I had active charge of the operations of all of those mines. Beginning in Colorado, there was one mine in the Baldwin field. Gunnison County, Colorado, two in Como, Colorado—I don't remember the county—Park County, and one at Louisville, north of Denver; and then passing to Wyoming, there were three mines at Carbon, five at Rock Springs, two at Evanston or Almy, and one at Grass Creek in Utah, and one at Schofield, in Utah. I was actively engaged in the operation of those various properties for over two years. After I left the Union Pacific

149 Coal Company, I opened and operated a coal mine at Rock Springs under the firm name of Mark Hopkins & Company. I was an independent operator at that time. I operated it and sold the property about a year and a half after its inception or after the formal incorporation of the company. The next coal operation which I was connected with was at Schofleid, Utah. I opened a mine there. I was engaged in operating it seven or eight years. I opened also and developed the Cumberland for the Union Pacific Coal Company, Mines Nos. 1 and 2, at Cumberland, Wyoming, in the Kemmerer coal field. I also made some prospect openings in Iron County in this State. I have not been employed under the particular heading of consulting engineer. I have, however, been employed by the legal department of coal corporations to assist them in adjusting difficulties which they had. In the case of the Utah Fuel Company I was employed by their legal department for several years investigating the coal fields in which they were operating. I have investigated the coal measure and coal fields in the west, and in Wyoming, Utah and Colorado. To be specific I have in all cases where I have had coal mines under my charge, I have paid particular attention to the occurrence of the coal, because that has always been a controlling factor in the development of the mines, in their success or failure. With that in view I have examined the coal measures in the State of Wyoming, not only at Carbon and Rock Springs, but the Kemmerer Coal fields and Almy coal fields, as well as the Grass Creek, Utah, and Castle Valley coal fields, and the Iron County coal fields in Utah. As to the Castle Valley coal field in the Utah Fuel Company's contention with the United States, myself, together with a party took the field, and we were in the field portions of two seasons investigating the Cas-

tle Valley coal fields. We investigated a scope of country from Green River at the crossing of the coal horizon, the Laramie coal horizon at Green River westerly and northerly to Castle Gate where the crop
150 crosses Price River, and from there southerly to Ivey Creek. As to the scope of country, I could merely estimate, make an approximate statement that would represent three hundred miles of outcrop at least on the irregular shaped outcrop. Of course, the direct line north and south and east and west would be much less. The scope of my examination imbraced the section in controversy, in this Section 32, Township 15 south of range 8 east. As to during what geological period the coal in the Castle Gate District occurred or was laid down. I will answer: In the Laramie series generally; that is, it is generally conceded that the coal horizon of the Castle Valley Coal field is contained within the Laramie series of rocks. There is one exception, however, and that is below the town of Emery, on a portion of Ivy Creek. There is an occurrence there of coal which has been assigned to the Bear River Laramie, and which is an occurrence of coal practically within the lines of the Colorado shale. None of the coal occurrences that I have investigated are within the carboniferous age. They are generally at this time assigned to the end of the cretaceous period. For a long time the general situation was disputed, some geologists placing the Laramie coal in the Tertiary, the base of the Tertiary, and others at the end of the Cretaceous or top. As to that being generally accepted now, the first compromise between the two extremes is that the Laramie was a change period between the two periods, or a change series between the two periods, the Tertiary and Cretaceous. These coals [occure] in the transition between those two periods. None of them are assigned to the carboniferous. In fact, the Carboniferous period—during the Carboniferous period this portion of the western continent was supposed to be a deep sea bottom, and on which was formed the lime deposition which represents the Carboniferous period in the mountains.
151 The condition generally recognized by geologists is that the transition between those geological periods was one of more or less disturbance, and the disturbance would have the general erosive effect of atmospheric disturbances as we see them today. Its general, the effect of erosion upon the general face of the earth today, is very apparent to any body and everybody, and we talk [or] erosion very familiarly. It has been apparently assumed, however, by some geological theorists, that the atmospheric disturbances, and particularly the erosive influence of the atmospheric dis-

turbances could not possibly have occurred during the period at which these coal formations were formed. I personally find no warrant for any such theory. I believe the erosive influences at the time of these Cretaceous coal depositions were fully as powerful as they are today. The basis of the theory upon which—which is accepted at the present time regarding coal depositions, is that it is formed from vegetable matter, under swamp conditions, with comparatively level surface, and prior to the laying down of the cover, the covering of sandstone and shales over these coal beds, the matter would not solidify, but was largely in a condition of Carbonaceous mud, one that would be peculiarly susceptible to erosive occurrences of any kind. We find actually in mine operations the effect of these erosive occurrences in the coal beds at the present day. The evidences are absolute at Coalville, in the Weber Coal fields and Grass Creek coal fields. I drove an incline some 1100 feet across an old stream bed, from which the Carbonaceous mud had been washed, and it had been refilled by heavier material, sand, clay and shells. Absolutely upon the coal horizon. The floor and the coal depositions not having been disturbed in any manner. At the No. 2 Cumberland mine in Wyoming, with the outcrop line thoroughly prospected and showing workable thickness of coal in all cases, the development of the mine was run into a similar want, as it was technically called by the miners, or commonly called, and practically destroying—well, shortening
152 the life of that mine by one half at least. At the present time, and last week, I had the privilege of viewing another similar occurrence. I will say that these want conditions are not unusal; some of them are small in extent, some of them large. Of course, we get a comparatively small idea or knowledge of the general conditions through actual development, because the development of the exposed coal areas is comparatively small as compared with the total area. I would venture to say, for instance, that we have not [exteed] five per cent of the coal areas developed by actual mines in any of these districts, and possibly I am estimating a high percentage at that. So that our actual knowledge, by real development work, is confined approximately to a very small area of the whole. To determine without actual development, the fact of a coal occurrence, is not possible for the reason, as we have illustrated, of these wants and erosive occurrences. That would be one reason. Other reasons are, there are other series of disturbances, or want displacements, not from erosive disturbances, but from the general conditions of the floor of deposition. The floors of the deposition in general are rather plane flat surfaces, and like all flat surfaces, they have

these small elevations at points. A fair example of the lake bottom would be the conditions between the point where we are sitting and Saltair, near Salt Lake, which is acknowledged to be an old lake bed. There we have, between here and the lake, a distance of eighteen miles, five ranges on very small elevations above the surrounding plain. These elevations run anywhere from ten feet down to nothing. Now, if under those conditions you had a deposition of Carbonaceous mud, in other words, seeking its own level, as water seeks its level, it would lie up against the sides of these elevated knolls, and if the knolls were thicker than the carbonaceous
153 deposits there would be a want in that case, according to the extent of the raised area. These rolls—miners call them rolls—where they are small, and where large they are wants, but these rolls are of common occurrence in all coal mines, and the wants are of less frequent occurrence because quite often the outcrop itself discloses the presence of these wants, or a condition which does not warrant the development of a mine in their immediate neighborhood. Naturally, coal operations are confined to points at which the very best showing as to thickness and quality occur in a coal field, and these points are generally the selected points at which to develop mines. I have finished my statement respecting the case of wants or lack of coal on the coal horizon. There of course are the conditions which have occurred since the coal was formed, and since the covering was laid down upon the coal, due to the burning of the present outcrop of the coal. These conditions are met with frequently in this coal field, and in the vicinity of the section in dispute in this case, namely, section 32, township 15 south of range 8 east.

The occurrence of a burned outcrop is frequently met with in all coal fields, although in a great many coal fields the burned outcrops are uncommon rather than common. In the Castle Valley Coal field for instance, the condition is remarkable [prevelant]. Speaking of burned crops in other districts, at Rock Springs we developed No. 4 mine there by driving through five or six hundred feet from the outcrop in ash, but there are not comparatively the larger areas of burned crops in that coal field that there are in this Castle Valley coal field. It is impossible without development to determine the extent of the burning along or into the coal measure. Along the coal horizon that are within and beyond the outcrop under cover, I am conversant with a

large number of outcrops and holes all along
154 this outcrop of practically three hundred miles. I am speaking of the Castle Valley coal fields. And further than that, specific instances, such as the development work attempted in Bull Canyon, which is a few miles north and east of Price. In that case a coal company attempted to develop the coal, and started in on the burned outcrop, and while I am not clear as to the exact distance driven, I know that it was over nine hundred feet, and it may have been a thousand and over; and they finally abandoned that opening because they had not at that distance yet found coal. It was all ash and sinter and was practically no coal. I have noticed where I have started on an outcrop of actual coal that I have found a burned area under cover. That is entirely practicable, and it does occur, from the fact that the burning under cover is not through in a regular line. The line of burning is as irregular a line as the general outcrop line, and at the operations in Coal Hollow of the Independent—I think the Independent Coal Comany, they in driving back under cover met this burned condition. That is in this same district; also at the Castle Gate mines, at the point where this heavy outcrop line crosses the Price River. The mine there followed the line of the burned area over half a mile, meeting it in different rooms as they drove up on the rooms toward the outcrop. In all the coal fields that I have examined in the west we do not have in any instance a continuous workable thickness of coal of commercial quality, in any coal field, for very extended areas. The history of mining in Wyoming and Utah is quite replete with showings which have proved the reverse of continuity of the coal.

In this Castle Valley coal field the general rule holds good. There is no continuous occurrence of coal in the series of rocks from which these coal fields in this western country takes its name, namely, the Laramie series. There are a number of
outcrop holes on this horizon or prospect holes that do
155 not develop coal, and in other places where coal should be developed if it were there, it is not developed. I have always been very much surprised at the attitude of the Government investigators in this matter, that they have taken no account of these barren holes and merely present the prospect holes in which a good showing of coal [occur-].

Speaking of the significance of a blossom, the actual blossom itself rarely is shown at the surface of the ground for any period of time, for the reason that the overlying roof, or the strata immediately overlying the coal is composed of a blackish gray shale, which weathers easily, and the weathering of which rapidly covers any weathering that there may have

been of the coal itself. The general appearance of the average coal horizon where there is coal or where there is not, is to be noted by the weathering of this shale rather than of the coal material. There are beds of shale in this field which are disassociated from the coal horizon. The beds of rock overlying the Castle Gate horizon consist of similar shales and sandstones. The beds underlying, the lowest beds of coal or the sub-Castle Gate coal are composed of Montana shales and the Colorado shales. Montana and Colorado shales have been so designated by the United States Geological Survey. The Montana shale occupies geologically, or is assigned geologically to the series of shales occurring immediately under the Laramie formation, and the Colorado shales here which I have mentioned, the Colorado shales is applied to the series occuring immediately below the Montana. The Montana and the Colorado shales practically form the floor of Castle Valley, and the weathered or weathering appearance of these shales would be practically the same as the weathered appearance of this overlying shale of the coal vein. The conclusion or deduction which I make from the state of facts I have observed in the Castle Valley field with respect to so-called blos-
156 soms as indicative of the absolute presence of coal to the ordinary lay mind, such as that of a farmer or one not conversant with coal occurrences, and not familiar with coal horizons as indicated by the rocks of a general coal outcrop—it would appear to one of these farmers in Castle Valley, just about the same as the weathered condition of the nearest hill to his farm. He would even have exhibited in his back yard the same colored material. I have samples of this particular shale and will produce them. That is Exhibit 1 of roof shale. It is as its name applies a fragment of the shale overlying the coal bed in the Miller Creek District. Exhibit 2, "Roof shale partly weathered" as its name emplies, is a fragment of the same shale showing weathered condition, in fact, weathered as much as I could bring on account of not holding together if it was further weathered. Also this shale [disintregates] into very fine material of very much the color of shale itself, dark in color as compared with the white sand rock which surrounds it. The weathering of this shale makes the covering of what would be the horizon of the coal along this horizon. I recently made a specific examination of Section 32, Township 15, south of range 8 east last week, and devoted the entire week, that is, from Tuesday until Friday night. That would be Wednesday, Thursday and Friday, and a portion of Tuesday. I knew I was on Section 32 because we had the County Surveyor hunting up the lines on the ground for us to inspect them. He pointed out the corners to us, so I am sure I was not mistaken. I had both Exhibits A. & B of the

plaintiff in this case, or copies of them with me on that visit. Exhibit A., J. W. C. is a white print of that exhibit. The changes I have made on the white print since my visit to the field and inspection of Section 32, I have merely added some more general information than is given originally on the plat on Exhibit A. I will say that I have merely added to plaintiff's Exhibit A, or to the white print of plaintiff's exhibit A, some further in-
157 formation in the shape, as the legend shows, of burned outcrops in red, and wooded lands which are shaded in green. For the purpose of Exhibit I have erased the legend relating to coal mines by cross hammers, from the fact that on the original Exhibit A the legend shows the cross hammers mean coal mines, and upon the map nowhere else do cross hammers occur except in the legend. I have erased that for that reason. Also I have added in the legend the word "horizon" to the lower workable coal beds, as it is entirely improper to project outcrop lines where the coal is not shown except by very closely connected prospect holes. At the points where letters A. B. and C. in green occur, they are used to designate a local condition. I found Exhibit A of the plaintiff, so far as its topography and geography of the country is concerned, a correct copy of the situation of the township and Section 32. I have, of course, made no definite survey of the crop lines or the horizon lines, but I should say that it is approximately correct. I so consider it. The line, or the hatched line represents and is conformable to the Castle Gate reef of sand stone, the horizontal Castle Gate reef of sandstone. The majority of the section is below the outcrop of the reef. The bulk on the section is, as shown by the canyons, and that sort of thing; accessible to both man and beast. The green shaded on the map represents the wooded portions of the section, and the red indicates or shows what I discovered to be the burnt outcrops as having the characteristic red and pink color of the ash in places, as shown. There are several second feet of water in the North Fork, also in the south fork and in the left hand—that is, as marked on this map, and the left hand fork, the main northerly portion of the canyon which heads in the northwest corner of Section 32, there is at
158 least one second foot, if not more of water. There is an ample supply of water for live stock that might graze or feed there, and it is good drinking water. I tried it a number of times myself. I will say further that the land is more or less—well, rather thickly covered with grass [whereever] there are open spots or grassy spots, and even though the timber where these trails occur, showing the droppings of sheep, cattle and horses that you can go most anywhere, on the trails

all over the section. The south exposures, south and west are generally grassy. In addition to the grass they have some mountain mahogany, some pinyon pine, and some service berry bushes scattered over the surface, but the balance of the surface is grassy, and even in the wooded part of it the grass grows under the cedars and pinyon trees, but the wooded portion is not thickly wooded, such as an eastern forest would be, or any forest; it is merely a wooded area. I should say the whole section was valuable for grazing purposes. In fact, I know it is valuable, and I know it is used for that purpose on account of these cattle trails, trails made by cattle that must have been grazing upon the ground. It further is—I was going to say that this land I presume as you know is in the Manti Forest Reserves. It is within the limits of the Manti Forest Reserve. It is probably ten years since it has been within the confines of that reserve. The reserve, as I recollect it, was set apart by Mr. Roosevelt during the time that he was filling the unexpired term of President McKinley, and if I remember right that would be in 1903 and 1904. As to the timber there is red and yellow pine, black and white balsam, and aspens, quaking aspens, commonly called, and I believe that is all. I observed timber there that could be utilized for saw mill purposes and converted into good lumber. I will state further that in the other fork, both the north fork and south fork, as designated upon the exhibit, there
159 have been saw mills, and there is one saw mill setting there but abandoned, at the forks of the main south fork, about on the east line of Section 30. There, however, has not been a saw mill set in this left hand fork on Section 32. At one point, near the west line of the section where the timber was a little better than usual, I [coulted] eleven tall trees there, probably 60 feet in height, and ranging from 2 feet to 2½ feet in diameter, of red and yellow pine. There were more than the eleven I counted, but yet they were a little thicker there, and that is what attracted my attention, in fact it was especially good at that point, especially the trees. Undoubtedly the section as a whole is valuable for the timber that is upon it. There is not timber that is standing there on that section today that has not values of its own for mining timbers and other timber purposes. The timber was practically the same size in 1894. The pine would not have appreciated very materially in diameter during that interval. The quaking aspens and the balsams might have increased materially in size.

As to the exposures on my recent visit upon this section I noted at a point marked with three crosses in the main left

hand fork, I noted coal horizons there, and upon looking closely I found an old opening, what has been an old opening on the Castle Gate floor, and another opening about 60 or 70 feet below that on the horizon between the Castle Gate coal and the sub Castle Gate coal—presumably the horizon of the old Wilson prospect, and below that and down the canyon a short distance below that virtually about 30 feet, another prospect of coal at a tunnel that was run in some 40 or 50 feet on a bed of coal some 10 feet in thickness. Exhibit 4 primarily, is to represent the general surroundings, the coal horizon and general surroundings in this section of the country. It specifically states that it is ap-
160 proximate section from Helper to Cedar Creek of the Laramie Division of the Cretaceous period." The distance, or the thickness rather of the series of rocks which I have shown upon the exhibit are approximately correct, but inasmuch as some measurement is necessary to give a general idea of the situation. However, these thicknesses vary very materially at different points; in fact there is practically no such a thing as continuity in thickness of any measure in this entire coal region. These thicknesses are relatively correct, [on-] with the other, for the purposes of illustration, at least, and show prominent markings of the sand stone beds of the country. I will say further than that, while on that subject, when I speak of prominent markings of the sandstone beds I merely mean optically prominent. In other words, that the general conditions as between the sandstones are indeterminable in any other way except optically where they occur in their relation one toward the other.

Speaking of Exhibit 4 and the three occurrences of coal I have observed on Section 32, the lower coal horizon at this point carries an opening about fifty feet in length showing a bed of coal approximately ten feet marked on this exhibit 4 as Castle Gate sub-coal horizon and indicated by the heavy black lines; and the middle occurrence of coal I speak of as the Wilson prospect. It is marked on this map "horizon of Wilson prospect" and is indicated in heavy black lines opposite that legend, a short heavy black line. The third occurrence of coal I testified to on the exhibit is shown by a heavy black line opposite to which is marked "Castle Gate Horison." The overlying rocks and underlying rocks are indicated as shown upon the exhibit. The portion of the section which is marked "thin bed yellowish sand stone, black and gray shales, occasional lenses or pockets of coal," are indicated on the map by the usual geological survey [sumbol],

but I must say that in the preparation of the section,
161 the vertical section, in the data which I furnished, I did not graphically show any of those lenses or pockets, because they are of extremely irregular occurrence in the vertical section. I note in the preparation of the section, however, that the draftsman has shown some apparent regularity of these irregular lenses. That is not true as to the actual conditions. I noticed other openings on the section in the left hand fork, of the left hand fork of Miller Creek, and just west of the center of the section, there is a prospect hole, in fact two prospect holes and also a natural exposure of two feet in width, and three or four feet in height on the same horizon, all on the same horizon, and close together.

I read Mr. Walker's testimony, the witness on behalf of the Government, and examined the exhibit, and I went to some of the prospect holes indicated on the exhibit. Stations 41 and 43 were not visited. Stations 41 and 43 would be above the so-called Castle Gate Horizon. They are very materially above it, more than half way between the Castle Gate horizon and the bottom of the Castle Gate sandstone reef. That is also true as to the station marked prospect pits at station 0 and 42 on Exhibit B. That is above the Castle Gate horizon. As to the other stations above said horizon shown on Exhibit B, I am not certain but these stations are like Station M near the northeast section corner. I don't know—I don't recall what that represents, whether that is supposed to be a blossom or a coal prospect, or what [is] is; the exhibit does not show, and my recollection is not good of Mr. Walker's testimony. In speaking of this Exhibit B, and in relation to the horizon of the Wilson mine as shown by the dotted lines on Exhibit B, I hardly understand why that outcrop was shown with the dotted line, while the other lines are practically solid, or of more solid form or more permanent form. The horizon as outlined by the dotted line does not anywhere in the
162 Castle Gate coal field carry a bed of working or workable coal. In the Castle Gate coal field there is not found a workable valuable bed of coal lying above the horizon on the so-called Castle Gate coal. I did not say that along the horizon of the Wilson mine or prospect there had never been discovered a workable vein of coal, but I do say there are no mines upon that horizon in the entire district, and that there are no large bodies of coal of sufficient area in which to place a mine. The coal occurring on the horizon of the Wilson prospect is erratic or adventitious in character. I was able to trace the Wilson prospect horizon or occurrence in Section 32 to other canyons. I did it. On the map it is what

is marked as the south fork of Miller Creek and just below the forks as shown near the east line of Section 30, a stone quarry has been opened on this particular horizon for the purpose of supplying stone for the head house of the gravity place of an operating coal company there. The quarry was faced up vertically about 25 feet and laterally about 30 or 35, and was exactly on the horizon or covering the horizon of this Wilson coal prospect or in which the Wilson coal prospect occurs. It shows in that face about the westerly face of this quarry, it shows about ten inches of coal, a little less than ten inches of coal, and in the left hand face of this quarry is [showed] a dark carbonaceous shale, and at the interval between the two also disclosing a dark Carbonaceous shale. The exhibit there was peculiarly an appropriate one on a small scale of the general condition of that horizon on a large scale throughout the entire district. Going from the point at which the Wilson prospect is opened in the left hand fork, and southerly to a point in the next canyon south of that, just beyond or west of the center of Section 32, at the point on Exhibit B near Station 26 and just above it, I again picked up the remains of the Wilson prospect in that
163 canyon, and there it consisted of a band of black shale about two inches wide, on the same identical horizon as it occurs at the Wilson prospect. It shows both on the north and south; using a common miner's expression, the coal has petered out. That is confirmatory of my experience in the district with respect to the adventitious occurrences of coal along that horizon. The most northerly cross on the section with the red painted around it indicates the burning of the coal, which is exhibited by the ash from the burning. I will say again, in connection with these burned crops, in order that the entire subject may be fully understood, that even where you get a continuous burned crop, perhaps for miles in extent, you will find small islands of unburned crop coal along that burned area. They are merely detached fragments, as it were, that were unburned. Whether it is due to the poor, unburnable character of the coal at points of that kind, or what the trouble was, I would not be prepared to say. That is a fact as it occurs in this field. The red marking southerly of these crosses [indicationg] coal exposures shows the extent of the visible burned portion, that is what is meant. You see on the north exposures of the canyon that are [timbere] covered, and that sort of thing, you don't get—. The soil is covered there with debris from the growing trees or a sort of mulch as you would call it in farming, that prevents your seeing the actual soil conditions or rock conditions; and in those cases I have not projected the line. It is, however, fair

to presume that even in [thos-] areas that are covered, that this burned condition continues, particularly in the points projecting between the various canyons as shown upon the map. So far as the red coloring appears within the confines of Section 32, that represents the actual visible burned area. I would say further in connection with this burned area proposition, that where burning has occurred, the Carbonaceous shales of the district will burn and create an
164 ash and present the same coloring as the burning of a coal bed. We have, for instance, and it is not infrequent in the district, these burned areas anywhere between the Castle Gate coal horizon and the Castle Gate—the bottom of the Castle Gate reef, owing to the shales and lenses of coal that occur therein.

Q. Now, these burned areas which you speak of in Section 32, are they along the horizon that you have last spoken of, or are they along the horizon of the outcrop of where these respective beds of coal occur?

A. Specifically in this case, where I have shown them as following the lowest workable coal bed horizon, they are absolutely observed on the horizon.

Q. On that horizon? A. Yes, sir.

Q. So that they are not referrable to what you last spoke of as being upper burned shale beds at some time?

A. No, sir.

Q. It refers specifically to that coal horizon?

A. I merely mention that shale burning as showing the fact of this red occurrence on the horizon where coal might occur does not necessarily imply that coal has been burned there. In Cedar Creek, a mile and a half south of the south line of Section 32 in question, in the southeastern portion of Section 9, township 16, south of range 8 east, there is being carried on some mining development in the shape of the projection of a coal entry or tunnel on the coal horizon, in a northerly direction, being parallel practically with the line between Sections 8 and 9. That development has been projected into the mountain approximately from 1000 to 1200 feet —I did not measure it accurately—I should estimate it as that from walking it. The outcrop showing at the mouth of the mine in the vicinity of point marked A shows some 23 feet of coal in thickness. I would say, before going further, that this coal occurrence is on the sub-castle Gate coal hori-
165 zon. After driving five or six hundred feet into the hill in this thick coal a want condition was met in this mine, into which the main entry heretofore spoken of has been driven a distance of three to four hundred feet, with the face still in want material. To the right of this main entry or

haulage way there have been projected, prior to reaching this want area, entries to the east, and in all cases the faces of those entries have met the same want condition. Now, the want condition in this hill, in Section 9, is designated, or rather about the face of the present main entry of the workings is designated at point B. I will say that in the next canyon to the north, practically half a mile from the mine mouth, an outcrop opening shows the coal bed on this horizon to be 20 feet thick, and practically clean coal. We have here an absolute occurrence of a want developed underground between two comparatively excellent outcrops showings, and I will say that there would be practically no visible indications by which a geologist or a mineral expert or any one versed in exploiting mineral and coal lands there would be absolutely no evidence of that condition until it was met with in the center of the mountain.

Q. And the result of that condition would be to break the continuity of the coal for the distance at least that you have observed it, and such further distances as future developments might expose.

A. Might absolutely expose, yes, sir.

Q. So that it would not be possible according to the true actual physical development as observed by you to start from this entry or opening there on sections 8 and 9, or from the prospect hole in Section 8, or the entry on section 9, and proceed to the north in continuous coal to section 32, as testified to by Mr. Taff in this case, would it?

A. Not on a direct northerly course as shown by the work that is absolutely done.

166 Q. And from the actual observations as disclosed to you in your recent trip, it would not be possible to start at the Wilson prospect and drive to the northerly in continuous coal to the point where you observed the fading out of the coal at the stone quarry in the other canyon would it?

A. No, sir.

Q. Now would it be possible from the same opening on the same horizon where the coal occurred in the Wilson opening, to proceed to the south and follow continuous coal to the point where you observed the Carbonaceous shale?

A. It would be impossible.

Q. To follow on continuous coal?

A. Yes, sir.

Q. Are there any other facts in connection with the coal occurrence on Section 32 you have not mentioned, which you would like to state, Mr. Hopkins, about which I have omitted to interrogate you.

A. I do not at his moment think of anything.

In determining whether or not land contains [kown] coal mines at a given time, the elements which are necessary in my judgment to be taken into consideration are; As a rule the presence of a horizon on which coal has been known to occur is a prime necessity; then the prospecting of this horizon in a thorough way, not by mere prospect holes, but by tunnels of reasonable length, and so that you really find you have a bed of workable thickness and quality for a reasonable distance is an absolute necessity. In some cases the practical operator goes further than that, is not satisfied with his outcrop showings, but assuming that he eventually will want to extend his workings over a mile or a mile and half, or a matter of that kind, the prudent operator would put a diamond drill in the field and ascertain the condition of the coal bed in the area which he intends eventually to add by operation to his property or mine. We know with the workable, or with any workable coal beds disclosed and developed upon a piece of property, the next element to be
167 considered are the markets that can be reached by the coal, and the accessibility of the coal, its location with reference to the market. I think that is an answer to your question. Accessibility in this Castle Valley district specially implies transportation facilities and nearness to the market. For instance, I should not consider in that sense a bed of coal over near the town of Emery nearly as valuable for present use as at Castle Gate, for instance. In other words, the proximity to established lines of transportation would be considered, of course, naturally—it must be considered. By transportation I mean railroad hauling or wagon hauling or with pack [annimals]. Of course, the tonnage from coal mines almost of necessity requires mechanical hauling. Originally when the county banks were being opened they did not call them coal mines, they called them country banks, and they generally worked on what they termed team trading, that is, people coming with teams and loading the coal at the country banks and hauling it away to their homes. That, however, hardly applies to the mine condition. It is more specifically the small opening for a local market among perhaps a few local people or a local settlement, as it were, but I know of no coal mine operating where they do not use mechanical haulage and mechanical transportation to the market.

Q. Now, assume, Mr. Hopkins, that the evidence shows that the occurrence of coal in 1894 at the time of the Enabling Act which was passed in the month of July, 1894, on this section 32 consisted of an opening at the so-called Wilson prospect and the one north of that, and that the coal on the sub-Castle Gate horizon was no opened until after July, 1894, and that the Wilson prospect hole at that time was in a dis-

tance from 30 to 50 feet, I will ask you to state whether or not that section at that time was more valuable as a coal section or for timber and grazing purposes, or whether
168 it would have any value as a workable known coal mine?

A. It would have no value as a workable known coal mine.

Q. In one other branch of the situation, what would you say in your opinion as to whether or not the section as a whole at that time, under those conditions, was more valuable as a section for timber and grazing purposes than for coal purposes.

A. It would certainly have a greater value for timber and grazing purposes.

Q. Now, assuming that at that time, and by that time I mean at the date of the passage of the Enabling Act, the section in question was disconnected from any railroad transportation, that the nearest point was somewhere about 18 or 20 miles from a railroad, the occurrence of coal being as I have already stated at that time. I will ask you whether or not that occurrence of coal there would be such as to constitute in your judgment a known coal mine, or whether the section in the then condition in which it was would have any value as a coal section of land?

Mr. Maynard: I object to this question, and I would like to have the same objection refer to the previous questions that my brother has asked on this subject, on the ground that it is entirely incompetent, and the witness is incompetent to answer such a question as the one prepounded and the preceding one, as it calls for an opinion on the law and the construction of the statute, and is relative to what constitutes coal lands and their value, and that the province of the witness is to state such geological facts as he may have discovered during his recent visit while the other question, as I say, is for the court and not for the witness.

A. I would like the question read.

Question read as follows: "Now, assuming that at that time, and by that time I mean at the date of the passage of the Enabling Act, the Section in question was disconnected from any railroad transportation, that the nearest point was somewhere about 18 or 20 miles from a railroad, the occurrence of coal being as I have already stated at that time, I will ask you whether or not that occurrence of coal there would be such as to constitute in your judgment a known coal mine, or whether the section in the then condition in which it was would have any value as a coal section of land, and by value I mean commercial value?

A. It certainly would not have a commercial value at any time under those circumstances, particularly, even if the coal bed was on a horizon known to contain usual or commonly large uniform deposits. There was no settlement in 1894, as far as my knowledge goes, that was not nearer some other source of coal supply than this particular opening in question on section 32. There was the town of Cleveland, a small settlement on the waters of Cedar Creek, and that settlement was somewhat nearer the Howard in Cedar Creek at that time, what is called the Howard mine in Cedar Creek, a large bed of coal near the point A upon the map, and where there is now the mine, where the outcrop shows some 20 feet in thickness and that sort of thing. The farmers would come in drive in and load their wagons and turn around and drive out again. I was in that opening in 1907, that particular Howard mine, and it was a very old opening at that time.

The coal from the Howard opening or mine could be transported by the then [meqns] of transportation to this settlement to which I have testified more cheaply and more readily than any coal from any prospect on Section 32, it being a shorter distance and a direct line up the creek from the settlement. In going to section 32 it is necessary to go around the point of the hills, but you will note upon the map here that the road leading from here would come around up this way, and that this is the most direct course to get to this settlement over here, that is on the east of the exhibit.

170 Q. Mr. Hopkins, assuming with respect to section 32 the same facts as to the occurrence of the coal that I put in the two preceding hypothetical questions, I will ask you to state what your opinion would be with respect to the value of the section for coal purposes on the 2nd day of November, 1901.

A. Why, it practically did have and would have no value.

Q. In other words, your answer would be the same as to the two preceding questions.

A. It certainly would.

Q. And your, answer, I take it, under the same assumption would be the same as to the first day of January, 1896, the day on which the State of Utah became a state of the Union?

A. It would, yes, sir.

Q. There are one or two questions I omitted to ask you respecting the map Exhibit A of plaintiff and Exhibit 3 of the defendant. You stated this morning, in answer to my question, that that map was correct, with the additions and omissions which you have supplied on it. I will ask you

whether or not you referred more particularly to section 32 which is in controversy or to the map as a whole?

A. I referred principally and specifically rather to section 32, and in a general way more specifically to the horizon of the lower coal bed, as shown upon the map, called the sub-Castle Gate Coal. There are, however other markings upon the map with which there seems to be some conflict between Mr. Taff and the United States Deputy Mineral Surveyor who made the survey.

Q. What do you refer to by that.

A. I refer to the legend in which there are small circles with a cross contained within them, set opposite the words "returned by Surveyor General as coal land." Now, calling your attention definitely to section 10 in township 15 south of range 8 east, I find that it is shown upon this map as entirely below the lowest horizon of the map produced and made by Mr. Taff.

171 This is coal horizon. On the other hand, go to section 31 in the same township and range and I find that returned as non-coal land by the Surveyor General, and classified by Mr. Taff as coal land. I hardly understand the conflict between the two, but presume it is merely an error of judgment of one or the other.

Q. So that when you have referred to the map as being correct you did not intend to refer to all these occurrences of coal?

A. No, I did not intend to refer to these coal returns by the surveyor general or by Mr. Taff as coal. I make that explanation in order to set myself right on this legend. The section is showing graphically the mountain between two branches of Cedar Creek. At the point marked A is the main opening, which is an outcrop of 22 feet of coal, and as the testimony this morning ran, that opening runs a number of hundred feet in the coal, and from the direction the mine is driving the mine enters from the left to the right, and the want material produces the appearance that is graphically shown on the section. The want material is developed at B here, this development showing the sloping bank or the sloping appearance of the dividing line between the want material, and the coal is absolutely developed at that point between A and B, and the want material is developed from three or four hundred feet beyond that point. Going through the hill approximately a distance of half a mile, as the testimony shows heretofore given, there is an outcrop opening on the same horizon showing 20 feet of coal. The point at which between the developed mine driven in the direction of this 20 feet of coal on this outcrop half a mile away, at which the want material ends and the coal again begins, of course, is uncertain.

It is marked on the map "ideal," but the main purpose of this section is to show the stream bank form in which this want material is deposited occurs.

172 That portion of the section from A to B is actually developed, an actual section, and so marked on the section, and that portion at the right hand side of the exhibit is ideal, except as to the outcrop opening at C which is developed, and that section is taken through a point shown on Exhibit 3 by the letters A. B. and C. I will say on this section the coal horizon, or the thickness of the coal bed is [edaggerated] in order to show more particularly this [st-cam] bank form of erosion, which was afterwards filled with this want material. There is no scale. It is an ideal section merely to illustrate the form in which this want material is deposited in the coal bed itself, and the method by which it was taken out by the stream erosion, the probable method by which the coal was displaced. I have samples of the want material. The material immediately adjoining the coal is marked exhibit 6, and is called "want bone." The term "want bone" or bony, is a term commonly applied to a mixture of carbon and sand, which while it will burn, is too inferior for commercial purposes. It is an admixture of coal and sand. Exhibit 6 represents such material in this specific case. It is caused by the erosive occurrence of this stream that you spoke of and mixing up of the Carbonaceous mud. I would in this connection however, while we are talking of bone, like to present, in order to illustrate the matter thoroughly as to the bone, I would like to present a sample of bone which occurs within the coal bed itself at times, showing the coal attached to the bone itself.

The portion of Exhibit B which is designated on white paper is the bone portion of the sample. Coal is shown clinging to it. That occurs sometimes in the coal bed itself. You will find bone exactly similar to this in connection with this want.

Q. Now, the occurence of the bone in conjunction with the coal in a coal bed, is that often an extensive occurrence?

A. [Wuite] extensive, yes, sir. It creates a banded condition at the time that [destroyes] the value of the coal bed.

173 Q. And that is not an unusual occurrence.

A. Not at all unusual, quite common. I can cite to you instances in mines that in their operations have run into banded conditions where this bond has occurred so frequently in the Laramie coal beds, as to render the coal beds worthless and valueless. I have met these conditions in connection with my operations in mining.

Q. And this bone material that is associated with the coal occurs in this particular district about which we are investigating? A. Yes.

Q. Now, I wish you would produce samples of bone or want material, bone rock.

This bone material occurs in this district about which I have been testifying. As you progress into this want area leaving the coal behind you, from the point A to the right, the first material you get to beyond the bone such as has been introduced here as Exhibit 6, being the want material replacing the coal, is shown by the sample marked "Want Rock" containing some carbon. Marked Exhibit 8. If you will notice, it has carbon finely disseminated through the rock. That is a gradual fading away of all evidence of any carbonaceous matter. Considerably more sand and less coal than the want bone Exhibit 6. I have a sample still further on in the progress of the work into this want marked "want rock" practically no carbon". Exhibit 9. There is practically no carbon in that. It would be properly termed argillaceous sandstone. These various specimens were found in these want sections developed as I have testified and break the continuity of the coal along the horizon. They were selected by me personally and brought here, and they were taken from that want area in Cedar Creek. It is at the point marked B in section 9, Township 16 south of range 8 east. There is evidence along the coal horizon which I observed in this section

174 where prospect holes have been excavated and show no coal whatever, for instance, there is a new corporation prospecting for coal in the country there. I have forgotten the name. They have been working about a mile east of Section 32, at a point in the northwest quarter of section 3, township 16 south of range 8 east. They have had—I have no acquaintance with the people who are doing the prospecting, except by repute, but there have been two miners working there about seven weeks, or had been last week, and they had just the week before I was there opened some coal. They had put in three holes that I saw, and driven them some distance into the hill. I am inclined to think that one of them was not on the proper horizon, and one of them probably was, and another one was I know, but it was on the burned outcrop, disclosing nothing but the ash.

Q. Do you know of any other?

A. It is not at all unusual in this connection—not at all unusual in this connection to have—

Q. What distance, how far apart were those holes, one from the other?

A. Oh, they would cover probably about four hundred feet on the outside, or five possibly.

Q. And by outcrop you mean? A. The horizon.
Q. The Horizon? A. Yes, sir.

On the proper horizon, that is on the coal producing horizon, the Castle Gate horizon and sub-Castle Gate horizon, I don't recall any holes that were placed, or that had been put in on the proper horizon where the outcrop was not burned, where they had not shown some coal. They show, however, considerable variation in thickness, and that sort of thing, but you might say fairly that there has not been, of course, an excessive amount of prospecting there. It is just at the head of a couple of canyons there.

175 I found prospect holes not developed in coal on the horizon in the Castle Gate section. That was a matter of frequent occurrence very frequent, and I venture to say, taking the entire outcrop of 300 miles or more, that fully 50 per cent of all the development is non-coal bearing on those horizons. They are not shown on the Government maps, and I believe their idea was to show only holes that showed coal developed.

At the Wilson mine the occurrence of the coal is practically between two beds of sandstone; it has a sandstone floor and a sandstone roof, and the coal occurs immediately between them, with practically no shale. Its outcrop, where it was disclosed, at the Wilson mine, was at the point where the rock was not soil covered, and coal must have shown originally about as the rock shows; that is, it was a bare exposure of this particular coal. I would say, however, that owing to the little talus bench below the floor of this coal jutting out from the cliff, that it would be impossible from the road to see this exposure of coal; one would have to practically ride up to it to see it, and that it stood out there as coal at the Wilson mine, that particular outcrop, that it stood out there exposing the coal is beyond question. In its natural state it was not a coal blossom or anything of that kind, but the coal was reasonably hard and in place. That is the coal bed that I heretofore stated was purely an adventitious bed of coal, and the one that petered out at both ends as stated, to the south and to the north. If my measurements of the Wilson coal prospect on that bed was four feet eight inches at the entrance exposure, and four feet six inches at the face I suppose it is quite natural, and in fact I know that no two men will measure a coal bed similarly, that is, they don't get the exact point, and with these continued variations in thickness even in a small face, it is almost impossible for two men to measure the same coal

bed exactly alike. Now, I notice in the Government's
176 testimony what they called their 5 foot bed I could not find any point at which I could measure 5 feet, but the average seemed to me to be about 4 feet 8 inches at the mouth, and as I say, 4 feet 6 inches would be the average of the face.

The cost per ton of mining coal in section 32 in November, 1901 taking into consideration the lack of railroad transportation and railroad facilities would be $1.60 a ton. That would have been equally true on the first of January 1896, and on the 16th day of July 1894. I only took into consideration the general mining cost. I was going to say that the transportation feature of sending it to market, and its proximity to the market is not considered in that. At those dates the nearest loading point would have been Price, and the distance is approximately 20 miles from a rather rough road, and estimating the cost of a team and man at $4.00 a day, the cost of transporting that coal would have been $4.00 a ton. I assume that it would take two days to make the round trip, and a good team could haul two tons. The coal on that section at the dates mentioned could not have been profitably mined and marketed. After it arrived at the railroad station, Price the coal would have had to meet coal from the Castle Gate mine, about fifteen miles away northerly, and to reach any market of any consequence it would have to be hauled over Soldier Summit into Utah and Salt Lake Valley.

The cost at that time was $1.75 a [tone] from Price here, or from Castle Gate here. (Meaning Salt Lake) When I said coal would have to meet other coal, I meant compete with coal produced at Castle Gate. The coal produced at Castle Gate was on the railroad. The cost of getting Castle Gate coal to market would be much less than the cost of getting any coal on the coal occurrence on Section 32. It is probable
177 at that time that the Sunnyside rate would have been somewhat lower. It is probable that the rate on this coal after it reached the railway would have been in excess of that of the Castle Gate coal. Of course, in the absence of absolute rivalry there is no way to get at it. I do remember there was some coal opened in that vicinity which on the strength of their being similar to anthracite—I don't remember just where the opening was, but I think it was somewhere in the Spring Canyon, if I recollect right, and they attempted to haul the coal by wagon and ship it, and notwithstanding they had a good thickness of coal there to work upon they found it absolutely impossible to meet other coal in [competetion], that was more favorably located as to transportation freight rates, etc. Spring Canyon is just east of Castle Gate.

Just beyond Helper, and runs back westerly into the hills just between Helper and Castle Gate. That coal was about 4 miles from the railroad. They were unable to profitably work that mine.

R. B. KETCHUM, a witness produced by the defendant being first duly sworn testified:

My full name is R. B. Ketchum. I live at Salt Lake, I am a teacher in the State University; that branch of the same known as the School of Mines, teaching railroading and mining, surveying principally, and some municipal subjects. I am a graduate of the University of Illinois in the year 1896. In 1900 I took another degree at the same institution, and while at the university I studied geology and the cognate branches to some extent. Came west in 1901. I had no experience with coal mines prior to coming west, only that I was raised in a coal field. My home was in a coal field in Illinois, and I was more or less familiar with that particular coal field there on account of having my home there. After coming west I first had experience in coal mining operations in
1906, November, at the properties which are now oper-
178 ated by the Independent Coal and Coke Company. That is in the Castle Valley coal field. The independent mine is about twenty eight or thirty miles from Section 32, I believe. I was in charge of that mine about a year and a half. As to the opening of the mine at its inception, I went on the property and took charge of it. They were driving a tunnel in what is known as Bull Hollow, and I continued to drive that tunnel until I worked out a scheme for getting the coal, and that work on Bull Hollow tunnel was abandoned owing to the fact that we didn't find any coal in the first opening. That tunnel was driven on the coal horizon from the lower coal bearing rock on what is called the Castle Gate Sub-horizon. It was driven along that horizon without encountering any coal about a thousand feet, and I abandoned it.

The topography there, as in all other parts of the coal field, is very irregular, and the coal is very inaccessible as a rule, and we knew where there was some coal showing, an actual natural outcrop, but owing to the inaccessibility we had some trouble in arriving at a feasible, practical scheme for operating it. We finally opened the mine which is not in operation, about a mile and a quarter southwest from the Bull Hollow opening on the same horizon. As to finding workable coal in the last opening, we ran [than] entry in what we thought the most favorable location, owing to the numerous prospect holes and openings which we had made, having coal on both sides of us, on the surface, surface showings. However, in driving

down on the slope all of our entries to the right at the time I left the mine were striking a burned coal area. There was evidence of burned coal at the outcrop of the horizon, but as I said, it seemed to be from the external appearances, I should judge it might be local, but evidently it was more intensive than we had thought. As to finding burned coal on the right of the entry down the slope, I will say every entry we drove,

179 and I think we drove four entries to the right, we struck burned coal. Our main slope, which was a straight line, of course, was the first right entry. We struck burned coal probably within fifty feet; as we went down the distance became greater to the burned coal, but never more than 250 feet so far as my work was concerned. The prospect holes which we started we had to abandon. There were hundred of prospect holes on that property, and we were trying to determine before we put in our extensive outside equipment something about the extent of the area. We ran our first right entry into the hill about three hundred feet I should say, from the surface where we found these burned areas, and that same condition continued until we went down a depth or length of about twelve hundred feet. On the entries and laterals from the entry to the right at that depth we found some burned condition. I might say further about that, that just to the right on the surface we had a little isolated outcrop there, that showed good coal, and it was exposed by shooting away of the cliff for a tramway. It showed an isolated area to the right, in which there was a full vein of coal. That was not over sixty feet to the right from the mouth of the entry. The exposure there was about 22 feet. We developed that on all sides to show it was simply sporadic in its occurrence. After driving in we fired our boilers out of that isolated island, some call it, and afterwards they went through that and struck burned coal beyond that again. It was very plain on the outcrop four or five hundred feet from that opening that it was burned, and in fact we would have considered ourselves very fortunate if the outcrop had not been burned, because we could have avoided a great deal of expense by going straight into the canyon at the head of the incline.

Q. Now, have you made an examination of section 32 and the surrounding—

Mr. Maynard: I move to strike out the testimony that the

180 witness has given so far, on the ground it is immaterial and irrelevant for the reason,—as I understand it, this rather unsuccessful enterprise was how many miles from Section 32.

Witness: About 28 miles I think I said.

Mr. Maynard: 28 miles away.

Mr. Ellis: In the Castle Valley coal field to which the section 32 belongs.

Q. Now, have you recently made an examination of Section 32 and the condition of that section.
A. Yes, sir.

Last week in company with Mr. Hopkins I was there on the property part of Tuesday and Wednesday of last week. As to timber the north slope of the various canyons were covered generally with a growth of timber, pine timber mostly. I think the growth of timber had some value. There were some of such size as to make timber or lumber. I saw a number. I noticed one tree as much as four feet in diameter, and most of the trees were probably over twelve inches to two feet and a half in diameter. There was some very good grazing there. I noticed a band of sheep grazing there at the time I was on the ground and some horses. A few head of horses. The timber was mostly red pine, I think, white and some—very little pinyon pine and some balsam. As to whether nearly all of those canyons—I noticed water in the most northerly branch of the canyon running at the time I was there, a good stream. It was sufficient to water stock, live stock and cattle. I am familiar with what has been called the Castle Gate reef. As to the reef encircling those sections, most af the precipitous cliffs lie outside of the section around near the section line making it better of grazing than where these cliffs are. There, of course, it would be valueless so far as grazing is concerned. But I noticed that the outcropping cliff did not cover a very large proportion of the ground where the grasses grew;
181 the balance of the section was accessible to live stock and cattle. I noticed a coal occurrence on that section. I noticed a number of outcrops in various parts of the section about as shown on Exhibit B. I had a copy of that. Two of the exposures were natural and the rest were artificial. They had been done by prospectors. I noticed particularly the coal occurrence which has been called in the testimony the Wilson prospect. It is the middle occurrence as indicated on Exhibit A of the plaintiff and Exhibit B of the defendant. I was able to trace the coal horizon in which that opening occurs in other portions of the section and adjacent sections. At what is known as mine No. 1 in Section 29, north of section 32, immediately north of Section 32 about six hundred feet westerly from the opening of mine No. 1 was a stone quarry face made by quarrying stone for various purposes at the Hiawatha mine. Near this stone quarry face I went particularly to look for this horizon to see if I could identify it. I immediately saw it ex-

posed. At the quarry I found an exposure about ten inches thick. It was not good coal. I would not call it coal. It was carbonaceous material, but [I] would not be called coal, I don't think. I did not find in any direction that same horizon in which the Wilson prospect occurs on Section 32. I heard Mr. Hopkins testimony, I did not see the opening or exposure that he found. I was not with him at the time. I was with him, but I did not see—I was not far away, but I did not see it, I was looking for it further up the canyon, and I did not see it. I saw an exposure of coal higher up than the Wilson prospect. It was indicated by rather shallow openings. Just shallow openings uncovering the vein. I saw an exposure below that on what is called the Castle Gate sub-coal horizon. That was a good vein of coal about ten or eleven feet with a shale top. I do not know when the opening was made. The other exposures of coal that I observed were in a horizon above the workable coal deposits in that field.

182 Q. State whether or not, in your opinion, in your experience in that field, these are sporadic or casual occurrences of coal. A. Well, I consider—

Mr. Maynard: I [onject] to the expression of opinion. I don't think the witness is qualified, or has qualified himself to speak as an expert in coal matters.

Q. Answer the question.

A. I have seen that only, in a good many miles of outcrop that I have traveled. I have only seen that vein uncovered in a few places.

Q. Now, what vein are you referring to?

A. The middle vein.

I observed on Section 32 evidence of burning. I was with Mr. Hopkins when we were making the examination with that purpose in view. The red shading within Section 32 as shown on Exhibit 3 approximately represents the burned outcrop area as I observed it. I think that is about as near as you can represent it upon that scale. I noticed outcrop of coal at the upper [—] of the coal exposures in that section. It is shown on the map Exhibit 3 indicated in the red line. I did not notice the particular exposure where the upper cross is. I did not notice any indication of fire at that point myself. I was with Mr. Hopkins and Mr. Lewis at the time but I did not happen to see that particular point there where Mr. Hopkins testified that he saw ashes. I was not there when the work was done that exposed the ashes; I did not notice it.

Assuming that the opening upon Section 32 exposed coal on the Second of November, 1901, the date of the approval of

the survey of this section, showed coal in the two upper workings, viz: the Wilson prospect and the one above that, and that there was no entry or opening at the lower or sub-
183 Castle Gate horizon, and that the entry upon the Wilson prospect then was thirty to fifty feet, and that there was no means of transportation, that is, no railroad transportation from this coal occurrence to market, and that the nearest railway point was eighteen or twenty miles away, I would say it would have no value; that no part of it was valuable for coal or coal purposes, and contained no known mine of coal. I refer to Section 32. It was more valuable for timber and grazing then it would be for coal. I would make the same answer under the same assumption of the coal occurrences placing the date as of the 1st of January, 1896; and I would make the same answer with the same assumption as of the date of July 16th, 1894.

Cross-Examination.

I went to Section 32 with Mr. Hopkins. I did not enter Section 32 at exactly the same time, but on the same day, and we left on the same day.

Redirect Examination.

Mr. Hopkins did not return to Salt Lake with me, but we left the section at the same time. If he went back after I returned, I do not know.

Mr. Ellis: I want to make a formal offer of all of these Exhibits that have been referred to in the testimony thus far, being marked Exhibits 1 to 9, both inclusive.

Mr. Maynard: Sure.

Said exhibits above offered were marked, "Exhibit 1, J. W. C." "Exhibit 2, J. W. C.", "Exhibit 3, J. W. C.", "Exhibit 4., J.W. C. [2], "Exhibit 5, J. W. C." "Exhibit 6, J. W. C.", "Exhibit 7, J. W. C.", "Exhibit 8, J. W. C.", "Exhibit 9, J. W. C." and are herewith returned into court as a part of this report.

MARK HOPKINS, a witness produced by the defendant, heretofore duly sworn, being recalled, further testified; on cross-examination:

184 I am not operating a mine now. I am living on the banks of Utah Lake. I have not title to the land yet. My entry upon that land dates back some three years. During the last three years, I have not had any connection with the actual operation of mines. I never operated a coal mine in the vicinity of Section 32. I left my homestead Monday

and returned there Saturday. I left Price going to the section on Tuesday. We arrived at the tipple of the Hiawatha Company about three o'clock on Tuesday. We stayed there that night. We reached Section 32 on Tuesday. On that day we went up further than the Wilson mine and crossed the horizon upon which the supposed Wilson mine occurred. That was on Tuesday. I believe the Hiawatha mine is in Section 28. Section 28, Township 15, South of Range 8 East. The tipple is used in connection with the workings of the Consolidated Mining Company; that is the way I understand it. I know of that company by repute, and know of its plant there. There is quite an extensive mine there. The handling portion of the operation is quite extensive. That is, the mechanical handling operation of the mine plant is quite extensive. It consists of a tipple, a plane railroad, pipe line and power plant. As to a railroad being constructed from Price to the mine to extract coal from the coal beds in Section 29 I cannot say.

Q. Do you know that for the purpose of handling coal that is extracted from the coal beds in section 29, a railroad was constructed from Price to the mine?

Mr. Ellis: I object to that as not being cross-examination.

A. That I cannot answer fairly, because you have used the word in the plural there, in the shape of beds, I will say as far as my observation is concerned, they were merely operating upon one horizon.

I know of a railroad being constructed up to the entrance
185 of the canyon, a distance of about twenty miles from Price. It connects with the D. & R. G. at Price. I am not aware of the fact that Arthur A. Sweet, the defendant in this case, in his life time was [interest--] in the development of this property. I am aware of the fact that he had some brothers who are at the head of that concern. I cannot give you the initials, but I would say that one of them is the president, as I understand it, of the Consolidated Company, and another one is secretary, I believe. Possibly another one purchasing agent. I cannot really outline the principal officers, because I don't know. I am not aware of the fact that these three brothers that are now the principal officers of this mining Company in Section 29 became interested in it through the instrumentality of Arthur A. Sweet in his life time. I have understood, however, that their lands are confined largely to this Section 29 as you have stated, and to lands in the north fork. I believe that is why they call it the Consolidated Fuel Company. It was a consolidation of some land in the north fork and in the middle form here called the south fork of this

Exhibit A. At the time of my visit to these fields I spent no time in the examination of the Consolidated properties. I am not aware positively of the land held by the Consolidated Company. I have no knowledge that is definite of that. I know of the fact that mining operations were going on in the south fork of Miller Creek, the northwest quarter of Section 29. They were not lifting coal out of the mine and doing the usual work when I was there. The mine was idle when I went by, it was an idle day. They were only working part of the time. I understand they are working one or two days a week, or a matter of that kind, but it was idle the day I was there. As to examining the various beds of coal, the plaintiff's testimony in this case shows that they are there; I measured—rather I did not absolutely measure either. I estimated the thickness
186 at the mouth of the mine there of the lower sub-Castle Gate horizon, and I took it that that was an operating mine—it had all the trimmings, anyway; and then from there I proceeded up the canyon, to a point where there was a stone quarry open, and within which would be contained the horizon of the Wilson prospect, as it shows in the left hand fork on Section 32. I went all the way up the canyon. The quarry was up the canyon some three or four hundred feet. As to examining the beds in Section 29, this is the only time, at the time of this trip, that I made to Section 32. I am rather positive it is, still in 1897 I went over this country. Not hunting, but for the specific purpose of determining the character of the land. That was when I was hired by the Utah Fuel Company. When I was prospecting for the Utah Fuel Company. It was a general reconnaissance.

Q. With the possible exception that you might have taken a bird's eye view of this immediate vicinity and of these extensive coal fields which make up the Book Cliffs, all that you know about the beds in section 29 is on the occasion of this visit last week.

A. The definite and specific examination of section 32 and the neighboring country there was made last week, yes, sir.

As to having examined all of the occurrences of coal in Section 29, as shown upon Exhibit A. I will say that I noted occurrences there, three or four occurrences, as shown in the west half of Section 29, or rather the northwest quarter of Section 20 and also in addition to that I noted at least another development on a possible coal horizon. I made the examination on Wednesday of last week. I cannot give you the date. The examination was made on the day following my arrival at the plant. I spent about four hours, I should say,

about three or four hours. I know we walked over on Section 28 and to and beyond the canyon in the northwest quarter of Section 32, and it is my recollection of getting back to the tipple or this little town of Hiawatha about nine o'clock at night. We got back, I know, after dark. When
187 I say "we" I refer to Mr. Ketchum. During my visit to this section of the country one of my companions was Mr. Ketchum; the other was a Mr. Lewis, who was engaged as superintendent. I believe by the Hiawatha people, and man by the name of Turner who is the County Surveyor of Carbon County. He was with us a small portion of the time. A part of one afternoon. Wednesday afternoon. Turner had two assistants with him in his survey work, locating the corners. However, while they were present, I did not consider them as composing the party at all. The work of Turner and his assistants must have been commenced at least on Tuesday or prior to that time. It must have been commenced on Tuesday, because on Tuesday afternoon, some little time after our arrival, Mr. Turner came in from the field with his instrument on his shoulder.

Q. Why did you leave your quiet pastoral pursuits on the shores of Utah Lake to go to this place?

A. I think you are rather reaching the limit when you talk about quiet, pastoral pursuits. While I am living there and on the shore of the lake, and that sort of thing, I only spend such time there as—I am making that my home or my headquarters—but I only spend such time there as I have to spend in idleness. However, answering your question more directly, the purpose of my going down there was to examine the character of these lands specifically. I was employed by the Consolidated Fuel Company. Because that company engaged my services is why I did the work. As to enjoying their hospitality in their mining plant on Tuesday night, we stopped at a boarding house which is not run by them, I know, but we stopped at a boarding house. We awoke about five o'clock on Wednesday morning. I examined this land rather minutely I believe, and slowly and carefully. I left the boarding house, it must have been about between seven and eight o'clock. We rode up the canyon on the enclined plane belonging to
188 the company. Before starting up on this plane, and in a general way at all times and from every point of view, I was noting the burned condition of the outcrops in general there, which are visible for a long distance, and was viewing the general formation there, the timbered character of the hills, the amount of water in the [streasm, ets]. I was accompanied by Mr. Ketchum on that morning. We rode up the canyon, as I have previously stated, upon the inclined plane, and the point at which the lowest coal horizon crosses

the bottom of the canyon, that being in the northwest quarter of Section. It would be something difficult to see what I did, but I can tell you what I did. From the horizon that I speak of we walked up the canyon about three or four hundred feet, and on the left hand side, the south side of the canyon, we came to the stone quarry on the horizon of the Wilson prospect, occurring in Section 32. In this quarry face, about 30 feet above the horizon of the lower coal bed was a band of shale and coal. There was coal in one side of the face of the quarry, [amou-ting] to perhaps 10 inches or a foot, and in the other side of this quarry face and largely across it merely a band of carbonaceous shale. I had seen the Wilson mine roughly about 13 or 14 hours before. I went up to the Wilson mine on Tuesday afternoon. This showing in this quarry face was the remains of the coal bed known as the Wilson horizon in section 32, I will say that I was specially looking in that horizon for the purpose of finding that particular bed. I had from general examinations in other portions of the coal field—I was aware that one should not look for any extended bed of coal upon that particular horizon, and in fact, generally throughout the entire distance, I will say, of the 300 miles of outcrop, coal rarely appears on that horizon, and when it does the area in which it so occurs is small and insignificant
189 and not valuable.

The Wilson mine is north a little northwesterly from the stone quarry. There is a pointed ridge between the two canyons in that intervening mile. I had a compass and I was standing at the stone quarry. I do not know if my companion had any instrument. We were at the stone quarry, I should judge, half an hour. I returned to the Wilson mine about noon, I should say on May 31. That would be Wednesday. There is no mine at this prospect. There is no mine in Section 32. The Wilson mine was an actual exposure. I have reason to doubt the accuracy of the testimony offered by the plaintiff that the entry there was about fifty feet in length, ten feet four inches [hing] from the openings at the face of the mine, and from ten to twelve feet wide, and the coal without material partings or impurities that would affect its quality. In the first place it is indefinite. This Exhibit A of the plaintiff, as I understand it, is a map made by Mr. Taff largely and practically a copy of the map that he made from investigation in 1907, or 1906, and as to what he found at that time, I am not aware. I made measurements of what you call the Wilson mine. I am testifying from memory as to the measurements I made. I made a note of it. The result of my examination was: The thickness of this prospect on the Wilson horizon was, the coal bed was 4 feet 8 inches at the entrance, 4 feet 6

inches at the face of the prospect tunnel, and the tunnel was a trifle over 150 feet long. I will say I did not measure the tunnel although I had a tape with me. But Mr. Lewis measured it with a rule. He measured it with a two foot rule, so that the measurement would not be absolutely accurate. It was not a point which was material—that is, it is not a material point in a short tunnel like that, whether the measurement is absolutely accurate or not, where there is no confusion between people as to the location of that tunnel. It had been driven into the ground about 150 feet. The face was some thinner in
190 its dimensions than at the opening of the entry, about two inches. I examined the quality of the coal. It is very difficult for one even versed in coal to give a true statement as to the value for fuel, or its commercial value, by any optical examination. I will say in general that the appearance of the coal looked as if it was of good quality. As to whether or not the coal had been taken out of this entry in 150 feet, there was a good deal there. I saw part of it on the dump. As to the [-mount], it would be very hard to estimate tonnage on that dump. It is spread out over a lateral extent of 50, 60 or 70 feet and a vertical distance of 15, 20 or 30 feet, as the case may be, and without absolute pits through the overlying material to reach the soil, you could not tell what tonnage was there.

As to finding good coal lying out there, I wish to be understood as testifying that a part of the material that came outside of the coal hole or prospect was lying on the dump in front of it. I suppose any one would assume that it was slack and debris. I observed the horizon on the Castle Gate coal bed some 50 or 60 feet above this Wilson opening. Down the canyon easterly from the Wilson prospect I noted on the Castle Gate Sub-coal horizon and the vertical distance from the floor of the Wilson mine to the floor of that bed was about 37 feet. There was exposed a prospect opening 40 or 50 feet long in the hill from the crop, and a bed of coal in the neighborhood of 10 feet thick. I would assume that the coal bed was wider than 10 or 12 feet. That is the opening. As to it ing a well defined bed of coal, it occurs on the horizon tha .s known to carry coal, and upon which mines are being operated in the district. I did not say that I saw a prospect pit about six feet and two inches of clear coal, I did not see that at all. As to there being a third bed of coal on Section 32 which is in the shape of a
191 prospect six feet two inches of clear coal exposed, I would answer, I have already described three beds. As to seeing a prospect of that [deneral] description, I saw other prospect pits besides those I have mentioned; but the ques-

tion of counsel is not specific enough to enable me to intelligently reply to it. I did not see in Section 32 a coal pit face that had six feet two inches of clear coal. I did not see a six foot two inch bed of clear coal at any time during my visit to this section of the country a[illegible]here. I have not a well defined idea of having seen three coal beds. But I do say that the horizon of these coal beds occur, the one that the lower bed is upon, the one, the middle adventitious bed, called the Wilson opening is upon, and that there is no opening, or was no visible opening upon the Castle Gate coal horizon. As to my conclusion in walking over the ground and looking with my naked eye without any instrumental examination, I will say, sir we had this Mr. Turner with us to do some levelling from the Wilson coal bed to the lower or sub-Castle Gate coal horizon between those two openings, the Wilson opening and the one immediately to the east of it.

I have examined Exhibit B. Mr. Ketchum had a rough tracing of Exhibit B with us at the time. We went to most of the stations marked on it. By most I mean, for instance, that above the Castle Gate coal horizon, which is the upper producing horizon of the entire district, which I was on that ground and went over the hill up one side and down the other, of this dividing ridge, closely looking for the coal blossom that Mr. Walker states in his testimony, I was unable to find any outcrop, and consequently I paid little attention to any of the adventitious coals and the character of any coal above this Castle Gate coal horizon. I paid little attention to it. For instance, at Station 41 where Mr. Walker shows a coal bed one foot 8 inches thick, I don't think in any coal field I have been in that I would go very far out of my way to note an
192 opening of that character. As to personally visiting the stations that are marked on that exhibit, I have already noted three. I will say, however, that Mr. Walker in preparing his Exhibit B, has taken some things for granted. For instance, here he says at Station 10-a marked coal bed 6 feet 6 inches thick. I hardly understand how it is possible for anybody to make a measurement of that coal bed, as there is no exposure of that coal bed, as far as I could see, and I walked that horizon carefully to find it. It is true in the testimony there is an old opening that has caved, and nobody has been in for some years at least. It has been merely a facing up of the coal bed, and is impossible of measurement by anybody.

As to indulging in glittering generalities, I am stating facts. The facts at that point are not disclosed to the naked eye. The inference may be drawn that that exists there, but not

actually. As to saying they were not disclosed to Mr. Walker, I will say, this X-ray vision that comes from a course of civic surveying is not given to me. I don't know what Mr. Walker saw. I visited Station 26, Station 7 and Station 29 I do not affirm or deny the existence of the exact amount of coal as marked on that exhibit, as I do not know as there were no facilities for determining.

re Redirect Examination.

I visited all the points where artificial openings had been made as exhibited upon Exhibit B, except those which lie above the Castle Gate horizon.

As to my employment, I was employed by Fred Sweet, and now that I recall it, he stated to me that he was interested in this matter on account of the estate of his deceased brother. I neglected to state that. I forgot to state that, and I wish to correct that statement in that way. Mr. Fred A. Sweer
193 appears upon the record as administrator of the estate of A. A. Sweet, deceased. What misled and why I made my mistake about the Consolidated Fuel Company employing me, is the fact that he was president of that company, and I went to their office in the matter, and it was an inadvertence upon my part. I had forgotten temporarily the real facts.

The exhibit which the examiner has marked Exhibit 10, J. W. C. is a portion of an occurrence of coal which is found in the development on Cedar Creek before the want condition is encountered, and is on the sub-coal horizon.

Mr. Ellis: We will offer that [pirce] of coal in evidence.

Said piece of coal was marked "Exhibit 10, J. W. C." and is herewith returned into court as a part of this report.

R. B. KETCHUM, a witness produced by the defendant, heretofore duly sworn, being recalled, further testified:

Cross-Examination

By Mr. Maynard:

I am a mining engineer. I am a civil engineer, but have done mining work. My studies in the past, some parts of them were, applied directly to mining. I am not preparing for the work of a civil engineer, I am in it. I am doing mining work now. A civil engineer's degree is a very broad term. It might include most anything. I am a mining engineer in the sense of developing coal mines, but not as a layman. I have no degree as a mining engineer.

Mr. Ellis: Let the record show that it is agreed by counsel that section 32 was purchased from the State by Arthur A. Sweet now deceased, and it was fully paid for as early as on the 4th day of January, 1907.

Mr. Maynard: Yes.

194 Mr. Ellis: Now, will you admit—Mr. Hopkins stated it, and there was no objection to the statement—will you admit that since the year 1900 section 32 has, by executive order, been placed within the confines of the Manti Forest Reserve.

Mr. Maynard: I don't know whether [ir] is so or not.

Mr. Ellis: Well, the records will show that.

Mr. Maynard: I don't know it. If it is a fact, of course, I will admit it.

(Mr. Walker left to ascertain in the Land Office.

Mr. Ellis: The record shows that section 32, was, by proclamation of May 29th, 1903, included within the limits of the Manti Forest Reserves, that is section 32, township 15 south of range 8 east.

Mr. Maynard: I agree that that is the fact,

Mr. Ellis: We rest.

Mr. Maynard: The Government rests and has no rebuttal testimony to put in.

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195 (List of Exhibits.)

Exhibit A. Map of Taff.

Exhibit B. Map of coal outcrop,

and the following exhibits hereto attached:

Exhibit D, report of Thomas D. Reese,

Exhibits C. & D photographs of Walker.

and also copy of the minutes of meeting of State Board of Land Commissioners showing copy of Thomas D. Rees' Report as to lands sold and prices, which was left with the undersigned but not offered in evidence; and I also attach the following exhibits offered by defendant, to-wit:

Exhibit 4, map of coal horizon.

Exhibit 5, Section map through A. B. and C;

and that the following exhibits offered by defendant are returned into court separately, to-wit:

Exhibit 3, White print of witness Hopkins.

Exhibits 1, 2, 6, 7, 8, 9 and 10, being samples of coal and bone.

(Approval of Statement of Evidence.)

The foregoing condensation of the record in this case is hereby approved.

J. A. MARSHALL,
Judge.

Filed July 9, 1914. Jerrold R. Letcher, Clerk.

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196 (Decree, February 16, 1914.)

This cause came on further to be heard at this term, and having been argued by counsel, upon consideration thereof.

It is Ordered, Adjudged and Decreed as follows, to-wit:

That the plaintiff is the owner and entitled to the possession of the following described real property, to-wit: The South half (½), and the North-west quarter (¼), and the North half (½) of the North-east quarter (¼), and the South-west quarter (¼) of the North-east quarter (¼) of Section Thirty-two (32), Township fifteen (15) South, Range Eight (8) East, Salt Lake Base and Meridian, containing six hundred (600) acres, situated in the County of Carbon, State of Utah, against any and all claims of the defendant, or of any person or persons claiming, or hereafter to claim, through or under the defendant. That said defendant has no right, title or interest, or right of possession in or to said premises hereinabove described, or to any part thereof, and the said defendant is perpetually restrained and enjoined from setting up, or making any claim to or upon said premises, or any part thereof, and all claims of said defendant are hereby quieted.

That the plaintiff, be, and is hereby decreed and adjudged to be the true and lawful owner of the said lands hereinabove described, and every part and parcel thereof, and its title thereto is adjudged and decreed to be quieted against all claims, demands, or pretences whatsoever of the defendant.

It is further Ordered, Adjudged and Decreed that the plaintiff have and recover its costs herein, taxed at $207.25 against the defendant.

Dated this 16th day of February, A. D. 1914.

J. A. MARSHALL, Judge.

Filed February 16, 1914.
Jerrold R. Letcher, Clerk.

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197 (Petition for Appeal by the Defendant, Sweet, Administrator, etc.)

The above named Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased, conceiving himself aggrieved by the decree made and entered on the 16th day of February, 1914, in the above entitled cause, does hereby appeal from said order and decree, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

DICKSON, ELLIS, ELLIS & SCHULDER,
Solicitors for Defendant.

Dated June 19th, 1914.

The foregoing appeal is allowed.

J. A. MARSHALL,
District Judge.

Dated June 19th, 1914.

Filed June 19th, 1914.
Jerrold R. Letcher, Clerk.

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198 (Assignment of Errors on Appeal by the Defendant, Sweet, Administrator, etc.)

Now, on June 19th, 1914, comes the defendant above named, Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased, by his solicitors, and says that the decree in this cause is erroneous and against his just rights, for the following reasons:

First. Because the Lower Court erred in ordering and entering a decree in favor of the complainant herein and against the defendant, and in not entering a decree in favor of the defendant and against the complainant, upon the ground and for the reason that in and by the terms, conditions and provisions of the Enabling Act of the State of Utah, wherein and whereby Section 32 was granted to the State of

Utah for school purposes, there is contained no reservation of any lands containing any mineral whatever; but to the contrary thereof, the said Enabling Act, in and by its provisions, grants unto the State of Utah, without any reservation whatever, the said Section 32, for school purposes.

Second. Because the Lower Court erred in ordering and entering a decree in favor of the complainant and against the defendant, and in not entering a decree in favor of the defendant and against the complainant, upon the ground and for the reason that at the time of the passage by the Congress of the United States of the Enabling Act, granting to the State of Utah the said Section 32, and at the time of the admission into the Union of the State of Utah, and at the time of the approval of the United States Government survey of the said Section 32, there was contained within the said Section 32, no known coal, or other minerals.

199 Third. Because the Lower Court erred in ordering and entering a decree in favor of the complainant and against the defendant, and in not entering a decree in favor of the defendant and against the complainant, upon the ground and for the reason that at the time of the passage of the Enabling Act and the admission of the State of Utah, and at the time of the approval of the said survey of said Section 32, there was not exposed upon said Section 32, or known to exist therein, or in any part or portion thereof, except upon the North-east quarter of the North-west quarter of said Section 32, any coal whatever, and that upon said Northeast quarter of said Northwest quarter of said Section 32, the coal there exposed was not coal, which at either or any of said times, could have been removed commercially, and that the said coal did not then have any known value whatever.

Fourth. Because the Lower Court erred in ordering and entering a decree in favor of the complainant herein and against the defendant, and in not entering a decree in favor of the defendant and against the complainant, upon the ground and for the reason that at the time of the passage of the Enabling Act and admission of the State of Utah, and at the time of the approval of the said survey of said Section 32, the said Section 32 was more valuable for timber and grazing purposes then for coal purposes, and at said time had [not] value whatever for the coal therein contained.

Wherefore this defendant prays that said decree may be reversed and that the said District Court in and for the District of Utah be directed to enter a decree herein, in accord-

ance with the prayer of the answer of this defendant, and as may be according to the rules of equity.

DICKSON, ELLIS, ELLIS & SCHULDER,
Solicitors for Defendant.

Filed June 19, 1914.
Jerrold R. Letcher, Clerk.

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200 (Order allowing Appeal to the Defendant, Sweet, Administrator, etc.)

On this day comes the defendant above named, Frederick A. Sweet, administrator of the state of Arthur A. Sweet, deceased, by his solicitors of record herein, and files and presents to the Court his petition for the allowance of an appeal, [inrendered] to be urged by him to the United States Circuit Court of Appeals in and for the Eighth Circuit, together with his Assignment of Errors, and prays that his appeal may be allowed and bond on appeal fixed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals. On consideration whereof it is ordered by the Court that said appeal be allowed, and said bond fixed at the sum of $1000.00, and that a certified transcript of the record, testimony, exhibits, [stripulation] and all proceedings herein, be forthwith transmitted to said United States Circuit Court of Appeals.

Dated June 19th, 1914.

J. A. MARSHALL,
District Judge.

Filed June 19th, 1914. Jerrold R. Letcher, Clerk.

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201 (Bond on Appeal by the Defendant, Sweet, Administrator, etc.)

Know All Men By These Presents:

That we, Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased, as principal, and William D. MacLean and J. M. Beatie, of the City of Salt Lake, County of Salt Lake, State of Utah, herein called sureties, are held and firmly bound unto the above named complainant in the full and just sum of One Thousand Dollars, to be paid to the said complainant, to which payment well and [trule] to be made, we [bond] ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by this presents.

Sealed with our seals, and dated this 16th day of June, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately, at the November Term of the District Court of the United States in and for the District of Utah, in a suit pending in said Court between the United States of America, plaintiff, and Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased, defendant, a decree was rendered against the said defendant, and the said defendant [was] obtained the allowance of an appeal by order of the said Court, to reverse the decree in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the said United States of America to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased, shall prosecute said appeal to effect, and answer all damages and costs if said Frederick A. Sweet, administrator of the estate of Arthur A. Sweet,
202 deceased, fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

(Seal) FREDERICK A. SWEET,
(Seal) WILLIAM D. MACLEAN,
(Seal) J. M. BEATIE,

Sealed and delivered in
presence of G. E. Forrester.

Approved by
J. A. Marshall,
Judge.

Filed June 19th, 1914. Jerrold R. Letcher, Clerk.

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203 (Citation on Appeal by the Defendant, Sweet, Administrator, etc.)

To the United States of America:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and af-

ter the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States District Court, Eighth Circuit, District of Utah, wherein Frederick A. Sweet, Administrator of the estate of Arthur A. Sweet deceased, is appellant and the United States of America is Appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John A. Marshall, United States District Judge, for the District of Utah, presiding on the trial of said cause, this 19th day of June, 1914.

J. A. MARSHALL,
Judge.

Copy of service admitted, this 19th day of June, 1914.

WILLIAM W. RAY,
[Attorneys] for Complainant.

Filed Aug. 17, 1914. John D. Jordan, Clerk.

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204 (Here follow the appeal papers on the cross-appeal by the Government, which are omitted from this printed record for the reason that said cross-appeal was dismissed upon motion filed by counsel for the Government.)

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213 Praecipe for Transcript on Appeal.

The Clerk of the above named Court will prepare and forward to the United States Circuit Court of Appeals, for the Eighth Circuit—a Typewritten Transcript—in the above entitled cause, and include therein the following, viz:

1. Bill of Complaint (in original suit).
2. Answer of Defendant (in original suit)
3. Replication to Answer (in original suit).
4. Bill of Revivor by original complainant.
5. Trial Order.

6. Condensed statement of testimony, evidence and proceedings upon the trial—with Exhibits.

7. Decree.

8. Petition for Appeal by Defendant.

9. Assignment of Errors by Defendant.

10. Order Allowing Appeal.

11. Bond on Appeal.

12. Citation.

And also.

13. Petition for (Cross) Appeal by Complainant.

14. Assignment of Errors.

15. Order Allowing Appeal.

16. Citation.

17. Praecipe for Transcript.

18. Certificate of Clerk.

DICKSON, ELLIS, ELLIS & SCHULDER,
Solicitors for Defendant.

WILLIAM W. RAY,
[Solicitors] for Complainant.

Filed July 8, 1914. Jerrold R. Letcher, Clerk.

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214 (Clerk's Certificate to Transcript.)

United States of America,
District of Utah—ss:

I, Jerrold R. Letcher, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from 1 to 214 are [as] full, true and complete [a] Transcript of all the proceedings, pleadings and records on file and of record in my office, in a certain cause heretofore adjudicated in said Court, wherein the United States of America was complainant and Arthur A. Sweet was defendant and where the United States of America was complainant and Frederick A. Sweet, administrator of the estate of Arthur A. Sweet was defendant, the latter cause being a suit brought in revival of the former suit filed after the death of said Arthur A. Sweet,—as it purports to contain and made pursuant to the praecipe filed therein by the parties hereto.

151 I hereby certify that the Original Citations are hereto attached and herewith returned with the Transcript of the record in this cause.

In Testimony Whereof, I affix my official signature and the seal of said Court, at Salt Lake City, in said district, this 25 day of July, A. D. 1914, and of the Independence of the United States of America the 139th year.

Seal
U. S. Dist. Court
Dist. of Utah.

JERROLD R. LETCHER,
Clerk U. S. District Court, District of Utah.

Filed Aug. 17, 1914. John D. Jordan, Clerk.

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152 And thereafter the following proceedings were had in the Circuit Court of Appeals in said cause, viz:

Appearance of counsel for appellant.

United States Circuit Court of Appeals, Eighth Circuit.

FREDERICK A. SWEET, ADMINISTRATOR OF THE ESTATE OF Arthur A. Sweet, deceased, appellant,
vs.
UNITED STATES OF AMERICA. } No. 4298.

The clerk will enter my appearance as counsel for the appellant.

W. H. DICKSON.
A. C. ELLIS, Jr.
RUSSELL G. SCHULDER.

A. R. BARNES,
Attorney General of the State of Utah, of Counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 17, 1914.

Appearance of counsel for appellee.

The clerk will enter my appearance as counsel for the appellee.

WILLIAM W. RAY,
United States Attorney.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 17, 1914.

Stipulation as to objection interposed by Mr. Ellis at time of taking testimony of Mr. Walker.

It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above-entitled case that the fol-
153 lowing objection was made by Mr. Ellis at the time of the taking of the testimony of Mr. Walker, and that although the same is not found in the condensation of testimony, that it is contained in the original transcript of the evidence at page 242, to wit:

Mr. ELLIS. I object to that as incompetent and immaterial what this witness or anybody else did with regard to the development of the measures of coal subsequent to the enabling act granting section 32 and other sections of land to the State of Utah.

DICKSON, ELLIS, ELLIS & SCHULDER,
Solicitors for Appellant.
W. W. RAY, *Solicitor for Appellee.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals Apr. 24, 1915.

Order of submission.

May term, 1915, Tuesday, May 4, 1915.

This cause having been called for hearing in its regular order, argument was commenced by Mr. A. C. Ellis, jr., for appellant, con-

tinued by Mr. William W. Ray for appellee, and concluded by Mr. Russell G. Schulder for appellant.

Thereupon, this cause was submitted to the court on the transcript of the record from said district court and the briefs of counsel filed herein

154 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4298.—September Term, A. D. 1915.

FREDERICK A. SWEET, ADMINISTRATOR OF the estate of Arthur A. Sweet, deceased, appellant, *vs.* UNITED STATES OF AMERICA, APPELLEE.	Appeal from the District Court of the United States for the District of Utah.

Mr. A. C. Ellis, jr., and Mr. Russell G. Schulder (Mr. W. H. Dickson and Mr. A. R. Barnes, attorney general of the State of Utah, appeared with them on the brief), for appellant.

Mr. William W. Ray, U. S. attorney (Mr. David S. Cook, assistant U. S. attorney, appeared with him on the brief), for appellee.

Before Sanborn and Carland, circuit judges, and Lewis, district judge.

Syllabus.

1. Statutes—Construction—Grant of Utah school lands—Mineral lands.

The enabling act of Utah grants the lands valuable for minerals as well as all other lands in sections two, sixteen, thirty-two, and thirty-six in each township not expressly excepted from the grant in section six thereof. 28 Stat., 107, 109.

2. Statutes—Construction.

Where the terms of a statute are clear and their meaning certain, construction has no place or office. The legal presumption is that the legislative body meant what it said, and it is the duty of the courts not to amend or revoke but to give effect to the enactment.

155 3. Same—Exceptions.

Where a legislative body makes a plain grant or provision and makes no exception to it the legal presumption is that it intended to make none, and it is not the province of the courts to do so. A fortiori, where a legislative body has made a clear grant or provision and has itself carefully considered and expressly stated in its act the exceptions, the courts may not strike down the exceptions it has made or add others which the enacting body excluded.

4. Same—Public policy.

When the law-making power speaks in no uncertain terms upon a particular subject over which it has constitutional power to legislate, public policy in that particular case is what the statute enacts, and the statute may not be repealed or amended by the courts on the ground that it is contrary to public policy because the same legislative body has treated other particular subjects or cases in a different manner.

5. Same.

The grant of lands to Utah for school purposes was not a sale, and neither section 2318, Revised Statutes, nor the act of May 10, 1872, 17 Stat. 11, chap. 152, reserving mineral lands from sale is applicable thereto. Neither of them disqualified the Congress subsequently to grant public lands valuable for minerals for school or other public purposes or modified or restricted the effect of such an absolute grant.

6. Same—General and special laws stand together.

Where general laws treating of many subjects and a law treating of one of those subjects, or one particular case, are inconsistent, they must, if possible, stand and be given effect together, the former as the general law and the latter as the law of the particular case or subject.

7. Equity—Equities of United States.

The equities of the United States appeal to the conscience of a chancellor with no greater or less force than would the equities of a private individual in like circumstances.

156 Sanborn, circuit judge, delivered the opinion of the court.

By the terms of the enabling act of the State of Utah the United States granted sections two, sixteen, thirty-two, and thirty-six in every township in that State to the State for the support of common schools. The act contained no exception or reservation of mineral lands from this grant. 28 Stat., 107, approved July 16, 1894. In the year 1904 the State of Utah contracted to sell section thirty-two in township fifteen south, range eight east of Salt Lake meridian, to George T. Badger, who assigned his contract to Arthur A. Sweet in 1906. Sweet paid the State for the land and was demanding his deed when in 1907 the United States brought this suit against him to quiet the title in itself on the ground that the section was well-known coal land when the State was admitted into the Union, and for that reason never passed to the State. The court below sustained the claim of the Government, and the administrator of the estate of Arthur A. Sweet, who had died meanwhile, appealed. He complains that the evidence established the fact that the land in question was not well-known coal lands, and that if it was, it was

granted to the State by the enabling act. Sections six, ten, and twenty of that act contain the grant and all the exceptions to and reservations from the grant, and they read in this way:

"Sec. 6. That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress other lands equivalent thereto, in legal subdivisions of not less than one-quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain."

157 "Sec. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only."

"Sec. 20. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislature of said Territory or by Congress, are hereby repealed."

The United States now asks the courts to amend section six by adding thereto the words "nor shall any mineral lands be subject to the grant or the indemnity provisions of this section," and thereby to revoke the grant of the mineral lands in sections two, sixteen, thirty-two, and thirty-six clearly made by the terms of the section. But such an amendment and revocation would be violative of settled canons of construction and established principles of law. The enabling act is clear, free from even the shadow of an ambiguity. And when a statute is plain and its meaning is certain, construction has no place or office. The conclusive legal presumption is that the legislative body meant what it said and the duty of the courts is to give effect to its acts, not to amend or repeal them. Brun v. Mann, 151 Fed., 145, 157; 80 C. C. A., 513, 525. United States v. Ninety-Nine Diamonds, 139 Fed., 961, 964; 72 C. C. A., 9, 12. Johnson v. Southern Pac. Co., 117 Fed., 462, 465; 54 C. C. A., 508, 511. Swarts v. Siegel, 117 Fed., 13, 18, 19; 54 C. C. A., 399, 404, 405. St. Paul, M. & M. Ry. Co. v. Sage, 71 Fed., 40, 47; 17 C. C. A., 558, 565.

Webber v. St. Paul City Ry. Co., 97 Fed., 140, 144; 38 C. C. A., 79, 83. Grainger & Co. v. Riley, 201 Fed., 901, 904; 120 C. C. A., 415, 418. United States v. Alamogordo Lumber Co., 202 Fed., 700, 706; 121 C. C. A., 162, 168. First Nat. Bank v. United States, 206 Fed., 374, 377, 378; 124 C. C. A., 256, 259, 260. Soliss v. General Electric Co., 213 Fed., 204, 207; 129 C. C. A., 548, 551.

Congress had the power to make or to withhold this grant in whole or in part. It had absolute power to reserve or except from the grant a part of or all the mineral lands in the State. Its attention was unavoidably called to the exceptions to the grant it would make, for it expressly provided in section six that lands in permanent
158 reservations for national purposes should be forever excepted from the grant and that lands in Indian, military, or other reservations should be excepted until the reservation was extinguished. Nevertheless, it did not except or reserve mineral lands from the grant. And where a legislative body makes a plain grant or provision and makes no exception to it the legal presumption is that it intended to make none, and it is not the province of the courts to do so. A fortiori, is it true that, where a legislative body has made a grant or provision and has itself carefully considered and specified the exceptions to it, the courts may not lawfully strike out the exceptions made or add others which the enacting body excluded. Such a proceeding would pass the bounds of construction and would constitute reprehensible judicial legislation. Hobbs v. McLean, 117 U. S., 567, 579. Maxwell v. Moore, 22 How., 185, 191; Sutherland on Statutory Construction, sec. 328. Cella Commission Co. v. Bohlinger, 147 Fed., 419, 425; 78 C. C. A., 467, 473. Omaha Water Co. v. City of Omaha, 147 Fed., 1, 13; 77 C. C. A., 267, 279. Chicago, M. & St. Paul Ry. Co. v. Westby, 178 Fed., 619, 631; 102 C. C. A., 65, 77. American Grain Separator Co. v. Twin City Separator Co., 202 Fed., 202, 205; 120 C. C. A., 644, 647. United States v. Alamogordo Lumber Co., 202 Fed., 700, 706; 121 C. C. A., 162, 168. United States v. Mo. Pac. Ry. Co., 213 Fed., 169, 173; 130 C. C. A., 5, 9.

Counsel for the United States seek to escape from the conclusion which the rules and principles to which reference has been made seem to compel, on the grounds that it is the settled public policy of the Government to reserve mineral lands from sales and grants; that section 2318 of the Revised Statutes provided that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law;" that the act of May 10, 1872, 17 Stat., 91, ch. 152, section 1, declared that all valuable mineral deposits in lands belonging to the United States should be "free and open to exploration and purchase, and the lands in which they are found to occupation and purchase"; that the Supreme Court held in Mining Co. v. Consol. Mining Co., 102 U. S., 167, that the mineral lands in California were excepted from the grant to that State by the act of March 3, 1853, 10 Stat., c. 145, p. 244, 246, of

sections sixteen and thirty-six in each township for public schools, and that in Deffeback v. Hawke, 115 U. S., 392, that court
159 held that the title of a claimant of a placer mine was superior to the claimant of a town site, in view of the provisions of the act of May 10, 1872, section 2318, Rev. Stat., and the town-site laws which expressly except mineral lands. Sections 2392, 2386, Rev. Statutes.

There are many reasons why the contention that the courts should amend section six and revoke a part of the grant it so clearly makes on the ground that the settled public policy of the United States is to except mineral lands from its grants ought not to prevail. In the first place Congress has declared in the enabling act itself in plain and positive terms that the public policy of the Nation was to grant to the State of Utah sections two, sixteen, thirty-two, and thirty-six in each township in that State, without any exception or reservation from that grant of mineral lands, for the support of common schools; and, as the Supreme Court said in United States v. Trans-Missouri Freight Association, 166 U. S., 290, 340, "the public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the Government officials, but when the law-making power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." Dewey v. United States, 178 U. S., 510, 521. The Supreme Court has twice considered the very question here at issue, the question whether or not under a like grant of school lands to Michigan without an exception of mineral lands the courts could lawfully enact that exception on the ground that such was the settled public policy of the Nation, and has twice decided, after exhaustive arguments, that they could not lawfully do so. Cooper v. Roberts, 18 How., 173, 177, 178; Roberts v. Cooper, 20 How., 467, 484, 485; Minnesota Min. Co. v. National Min. Co., 11 Mich., 186, 3 Wall., 332.

Moreover, while it has been the general practice of the United States to reserve mineral lands from homesteads, preemptions, sales, and grants to railroad companies, an examination of the grants of lands to States for school purposes demonstrates the fact that it has been the practice of Congress to determine and declare by legislative act in each case, and not by any settled public policy, whether or not mineral lands shall be reserved from the grant. They were not reserved from the grant to Michigan. The grant to Utah is in substantially the same terms. They are not reserved
160 from the grants of school sections to Wisconsin, Minnesota, Missouri, or Kansas, and the acts of February 18, 1873, 17 Stat., ch. 159, and May 5, 1876, expressly provide that the public lands in those States are excepted from the provisions of the act of May 10, 1872, 17 Stat., 91, and of section 2318, Revised Statutes. The enabling act of Colorado, 18 Stat., 474, expressly provides that all

mineral lands shall be excepted from the operation of its grants. The enabling act of the State of Washington, 25 Stat., 676, grants the sixteenth and thirty-sixth sections in each township for school purposes and then provides that if either of these sections shall be found to be mineral lands they shall not pass to the State, but other lands in lieu of them may be selected; and the same provision is found in the enabling acts of Idaho, Montana, North Dakota, South Dakota, and Wyoming. On the other hand, the enabling acts of Florida, May 17, 1856, 11 Stat., 15, and of Oklahoma, June 16, 1906, 34 Stat., 273, grant the school lands without any reservation of the mineral lands and the latter act contains convincing evidence, in addition to the grant itself, that Congress intended to grant the mineral lands in the school sections, for it expressly provides that where the lands granted for school purposes are valuable for minerals the State shall not sell them prior to January 1, 1915, but that it may lease them and apply the proceeds to school purposes. Thus it appears that mineral lands are not excepted from the congressional grants of school lands to Michigan, Minnesota, Wisconsin, Missouri, Kansas, Florida, and Oklahoma; that they are excepted by express provisions to that effect in the enabling acts which grant school sections to Washington, Idaho, Montana, North Dakota, South Dakota, and Wyoming; and that in the latter acts provision is made for the selection of indemnity lands. The grant of school lands to Utah is in substantially the same terms as the grant to Michigan; it contains no exception of mineral lands and no provision for indemnity lands in lieu of them, and the conclusion is unavoidable that the acts of Congress disclose no such settled public policy to except mineral lands from grants of school lands as would sustain the courts in amending a grant without such an exception by inserting it, but they demonstrate the fact that Congress has exercised its constitutional power to make grants with and without such an exception as its good judgment dictated, and they impose the duty on the courts not to amend or revoke them by construction, but to enforce them according to their plain terms and certain meaning.

161 Section 2318, Revised Statutes, U. S. Comp. Stat. 1901, p. 1423, invoked by counsel for the Government, descended from a provision in section 5 of "An act concerning certain lands granted to the State of Nevada," approved July 4, 1866, 14 Stat. 86. That act confirmed certain grants to the State of Nevada and made others. Section 5 related to surveys and provided that in surveying the lands in Nevada the lines of the surveys might so vary that the forms of the tracts would be other than rectangular and added "but in all cases lands valuable for mines of gold, silver, quicksilver or copper, shall be reserved from sale." The form in which this provision now appears in the Revised Statutes is, "In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law." Sec. 2318, Rev. Stat. But this provision merely reserves from sale by the United States lands valuable for minerals.

It does not prohibit the United States or its Congress from giving or granting such lands for educational or other public purposes, nor does it in any way restrict or limit its legislative power so to do. The grant here in question is not a sale, and section 2318 is inapplicable thereto.

For the same reasons the provisions of the act of May 10, 1872, 17 Stat., 91, chap. 152, section 1, which declares that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be "free and open to exploration and purchase and the lands in which they are found to occupation and purchase," and the various statutes under which lands of the United States valuable for coal and other minerals may be acquired by miners fail to restrict or limit the power of Congress to make this grant, or to modify its plain meaning and effect. They are parts of the general laws of the United States relative to the sale and disposition of its public lands by the officers of its Land Department, and they in no way disqualify the Congress itself that made them from disposing of those lands by subsequent grants at any time before the rights of private parties have attached to them under the general laws. Moreover, if this view were incorrect and if there were in any of the acts of Congress to which reference has been made, or in any other of its acts, a restriction or prohibition of the grant of the mineral lands in these school sections, the Congress which made such restriction or prohibition could repeal it in whole or in part, and it has clearly done so to the extent necessary to validate the grant of the mineral lands in the Utah school sec-

162 tions. In the first place, it has made by section six of the enabling act a clear and certain grant of the four sections in each township without exception or reservation of mineral lands, an enactment sufficient in itself to relieve from any previous prohibition or restriction in the general laws under the familiar rule that where general laws applicable to many subjects, and a special law treating one of those subjects are inconsistent; they must be read together and effect must be given, if possible, to both—to the former as the general law of the land and to the latter as the law of its particular subject. Board of Comm'rs v. Aetna Life Ins. Co., 90 Fed., 222, 227; 32 C. C. A., 585, 590. King v. Pomeroy, 121 Fed., 287, 294; 58 C. C. A., 209, 216. Christie-Street Comm. Co. v. United States, 136 Fed., 326, 333; 69 C. C. A., 464, 471. Hemmer v. United States, 204 Fed., 898, 906, 907; 123 C. C. A., 194, 202, 203. Priddy v. Thompson, 204 Fed., 955, 959; 123 C. C. A., 277, 281. Gowen v. Harley, 56 Fed., 973, 978, 979; 6 C. C. A., 190, 195, 196. State v. Stoll, 17 Wall., 425, 436. In the second place, the Congress, by section ten of this enabling act, has provided that the "proceeds of the lands herein granted for educational purposes, except as hereinafter provided, shall constitute a permanent school fund, * * * and such lands shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether

surveyed or unsurveyed, but shall be surveyed for school purposes only." If the mineral lands in these sections were open to entry or acquisition under the coal-land laws or under any other laws of the United States before this enabling act was passed, here is an express exemption of them from those laws and a devotion of them to the school purposes of the State of Utah. If under section 2318 they were expressly reserved from grant as well as from sale "except as otherwise expressly directed by law," here is an express direction by law that they shall be disposed of by grant to the State of Utah for the support of its common schools, and, finally, to make assurance doubly sure the Congress provided, in section 20 of the enabling act, that "all acts or parts of acts in conflict with the provisions of this act whether passed by the legislature of said Territory or by Congress are hereby repealed." If there were any previous acts of Congress in conflict with the grant of the four sections in each township in Utah and all the land therein, whether valuable for mineral or not, they were, so far as they related to those sections, unavoidably repealed by this provision of the enabling act of Utah. And
163 this review of the general and special legislation on this subject but serves to strengthen and confirm the conclusion that Congress intended to grant and did grant to the State of Utah by its enabling act all the lands valuable for minerals as well as all the other lands in sections two, sixteen, thirty-two, and thirty-six in each township in that State, except those expressly reserved by section six.

It is contended that the decisions of the Supreme Court, in Mining Co. v. Consolidated Min. Co., 102 U. S., 167, and Deffeback v. Hawke, 115 U. S., 392, sustain the view that the courts should amend the enabling act of Utah by revoking its grant of the mineral lands in the school sections and adding to section six an exception of those lands from the grant. Let us see. It is a familiar rule of construction that every decision of a court should be considered and given effect in the light of the facts which conditioned it. In the case in hand the United States had granted to the State of Utah by plain unequivocal words without any exception of mineral lands the four school sections in each township in 1894. Twelve years later the State contracted to sell this land to Mr. Badger. In reliance upon this plain grant and the State's contract with Badger, Mr. Sweet, the original defendant, purchased that contract, paid the purchase price of section thirty-two, the land here in controversy, $1,920.00, to the State in 1907 and asked the State for his deed, when for the first time the United States by this suit in equity sought to revoke its grant of that section and to recover the land. After waiting twelve years and until the defendant had paid the full price of the land to the State, from which he could not recover it, before commencing its suit to amend its grant, and after waiting six years more before submitting its case to the court below, more than eighteen years after the grant, the United States appeals to a court of chan-

cery to revoke its plain grant of the mineral lands in this section thirty-two, to impose a loss of $1,920.00 and interest upon the defendant and by its judicial decision to except all mineral lands from the plain grant of them. The equities of the United States appeal to the conscience of a chancellor with no greater or less force than those of a private individual under like circumstances. State of Iowa v. Carr, 191 Fed., 257, 266; 112 C. C. A., 477, 486. United States v. Detroit Timber & Lumber Co., 131 Fed., 668, 677; 67 C. C. A., 1, 10. United States v. Chandler-Dunbar Water Power Co., 152 Fed., 25, 26, 27, 37, 38, 40, 41; 81 C. C. A., 221, 222, 223,
164 233, 234, 236, 237. United States v. Stinson, 125 Fed., 907, 910; 60 C. C. A., 615, 618. State of Michigan v. Jackson, L. & S. R. Co., 69 Fed., 116, 122; 16 C. C. A., 345, 351. United States v. Stinson, 197 U. S., 200, 204, 205. United States v. Chicago, M. & St. P. Ry. Co. (C. C.), 172 Fed., 271, 276. United States v. California & Oregon Land Co., 148 U. S., 31, 41. Carr v. United States, 98 U. S., 433, 438.

And one who by material misrepresentation or by silence when he ought to speak out induces an innocent person to so change his situation that he will suffer substantial loss if the former takes advantage of the truth which he misrepresented, or of the silence which he ought to have broken, is in equity estopped from so doing. If a private owner of this land had conveyed it to a third person, if that conveyance had become a public record immediately, if the grantee had contracted thereafter to convey it to a fourth person and another had purchased that contract and paid the purchase price to the third person in reliance upon the conveyance twelve years after it was made, no court of equity would fail to hold that the grantor was thereafter estopped from avoiding that conveyance. And when to these facts are added the fact that the highest court in the land had twice held before Mr. Sweet bought the land in controversy that a grant in like terms conveyed the mineral lands in the school sections, Cooper v. Roberts, 18 How., 173, 177, 178; Roberts v. Cooper, 20 How., 467, 484, 485, all the equities in the case at bar are with the defendant. What was the case of Mining Company v. Consolidated Mining Co., 102 U. S., 167? The plaintiff in that case sought to recover land in a school section under the act of March 3, 1853, 10 Stat., chap. 45, pages 244, 246, from defendants, who were in possession of the land under mining claims which had been instituted in 1851, 1853, and 1863, under the mining laws and customs of Spain and the United States. Some of the defendants' claims had been instituted before the act of 1853 was passed, and there was a town of some four hundred inhabitants on the land at that time. In the face of these claims and this possession the claim of the plaintiff was originated by its predecessor in interest by an application in 1870 to the State of California to purchase the land from it, followed by a conveyance. The claims of the defendant had passed to patent in 1873, under the United States mining laws and customs.

In other words the claims of the defendants were prior in time, rested on the mining laws and customs, were supported by
165 prior mining operations, possession, and occupation. The claims of the plaintiff were subsequent and apparently speculative and the equities of the case were with the claimants under the mining laws.

The case now in hand and the Michigan case arise on plain grants of school sections in simple enabling acts, in special acts for these particular purposes. But the act of March 3, 1853, under which the Mining Company's case arose, is a general law for the disposition of the public lands in California, and it is full of provisions relating to subjects other than those treated in the Michigan and Utah acts. It is entitled "An act to provide for the survey of the public lands in California, the granting of preemption rights, and for other purposes." It provides for the appointment of a surveyor general, for land districts, and registers and receivers of land offices. Section three expressly prohibits the survey of mineral lands into sections, thereby effectually preventing the selection of school sections from mineral lands. Section five declares that all the public lands in California, "with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township," and with the exception of certain other lands and the mineral lands, shall be subject to preemption, homestead, etc., and in this quoted exception is the entire grant of the California school lands. Section six excepts mineral lands from preemption, section seven expressly provides that where any settlement has been made on school sections, or parts of them have been otherwise taken, lands in lieu thereof may be selected, * * * "nor shall any person obtain the benefits of this act by a settlement or location on mineral land"; and the Supreme Court held, among other conclusions, that the settlement and occupation of the lands in the Mining Company case excepted them from the grant under this section (102 U. S., 176), a fact inapplicable to the case in hand. Section eight deals with "the public lands not mineral lands." Section twelve grants to California ten sections of land for public buildings, to be selected by the governor, "provided, however, that none of said selections shall be made of mineral lands or lands reserved for any public purpose," etc., and section thirteen contains a similar grant and proviso. The Supreme Court, perceiving the compelling equities of the defendant and of miners in California who had claimed and operated mines under the Spanish and United States customs and laws of mining before and after the passage of
166 the act of 1853, reviewed that act, and, influenced among other things by the prohibition of the survey into sections of mineral lands found in section three (102 U. S., 173, 174), the express reservation of mineral lands from preemption in section six, and the express reservations of mineral lands from the grants in sections

twelve and thirteen, held that it was not the intention of Congress by the act of 1853 to grant, and it did not grant, lands valuable for minerals to the State of California for school purposes, and that, even if it did, the lands in controversy were excepted from the grant by the settlement and occupation thereof prior to the time the act was passed. But none of the reservations or exceptions of mineral lands in the act of 1853 which led the Supreme Court to that conclusion, and no like reservations or exceptions are found in the Utah act, although several grants of lands in addition to the grant of the school sections were made thereby, and a careful consideration of the act of 1853, the facts of the Mining Company's case, and the exhaustive opinion therein, have left no doubt that neither the decision in that case nor the reasons for it are controlling of or applicable to the case in hand. The facts and the grant in this case are not at all analogous to those in the Mining Company's case. They are not only analogous but substantially identical, so far as the legal question is concerned, with the Michigan case; and the opinions in that case and the stronger reasons persuade that the decisions therein should control and that the grant of the school sections to the State of Utah should be held to include the mineral as well as the nonmineral land therein.

The opinion in Deffeback v. Hawke, 115 U. S., 392, has been thoughtfully read and considered. But that case presented for decision no question of the power of Congress to grant, or of the effect of its grant of lands for school or other public purposes, and whatever may be found in the opinion sufficiently general in its terms possibly to include that subject, appears to have been said without intent to decide any such question in discussing the disposition of the public lands by the executive officers of the Government under the general land laws. The question there at issue was whether claims to the land in dispute under the mining laws or claims to it under the townsite laws were superior, and the opinion and decision is neither controlling nor persuasive upon the issues in this case. Still less relevant is Brigham City v. Rich, 97 Pac., 220.

167 The opinion of Secretary Bliss in State *v.* Utah, 27 L. D., 53, 55, to the effect that mineral lands were excepted from the grant of the school sections to Utah, and his opinion in Florida v. Railroad Co., 26 L. D., 600, 601, that such lands were excepted from the grant of May 17, 1856, to Florida, 11 Stat., 15, have not escaped consideration, but the reasons which have already been stated, perhaps at too much length, have convinced that so far as the grant to Utah is concerned he and the court below were in error in their conclusion, and that Congress by the enabling act of Utah intended to grant, and did grant, the lands valuable for mineral in the school sections named as clearly and effectually as it granted any land whatever therein. This conclusion renders the consideration of the question whether or not the lands in controversy were known to be

valuable for mineral immaterial and it is useless to discuss it. Let the decree below be reversed, therefore, and let the case be remanded to the court below with instructions to render a decree for the defendant below.

Filed September 27, 1915.

168 *Decree.*

United States Circuit Court of Appeals, Eighth Circuit. September Term, 1915. Monday, September 27, 1915.

FREDERICK A. SWEET, ADMINISTRATOR OF THE ESTATE OF Arthur A. Sweet, deceased, appellant,
vs.
UNITED STATES OF AMERICA. } No. 4298.

Appeal from the District Court of the United States for the District of Utah.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed without costs to either party in this court.

It is further ordered that this cause be, and the same is hereby, remanded to the said district court with directions to render a decree for the defendant below.

September 27, 1915.

Petition for appeal to Supreme Court, U. S.

The above-named appellant, the United States of America, conceiving itself aggrieved by the decision and decree of the United States Circuit Court of Appeals made and entered in the above-entitled case on the 27th day of September, A. D. 1915, does hereby appeal from said decision and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record and proceedings in said cause, with all things concerning the same duly authenticated, may be
169 sent to the Supreme Court of the United States.

WILLIAM W. RAY,
United States Attorney, attorney for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 10, 1916.

Assignment of Errors on Appeal to Supreme Court, U. S.

And now comes the United States of America, appellant, by its solicitor William W. Ray, and says that in the record and proceedings herein there is manifest error, and that the United States Circuit Court of Appeals for the Eighth Circuit erred in this:

First. In holding and deciding that the act of Congress approved July 16, 1894, entitled "An act to enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States" granted to the State of Utah all of sections 2, 16, 32, and 36 in each township within said State irrespective of the known mineral content of said sections of land at the date of said grant.

Second. In not holding and deciding that known mineral lands were reserved from the grant by the United States to the State of Utah of sections 2, 16, 32, and 36 in each township under the act of Congress approved July 16th, 1894, entitled, "An act to enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States."

Third. In holding and deciding that the act of Congress approved July 16th, 1894, entitled, "An act to enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States" was not
170 limited as to the lands thereby granted to the State of Utah by section 2318 of the Revised Statutes of the United States, 1878, and by the established policy of Congress in such grants.

Fourth. In holding and deciding that the United States of America was estopped to claim that section 32, township 15 south, range 8 east, was not granted to the State of Utah by its said enabling act.

Fifth. In holding and deciding that the United States of America was estopped from questioning the title of appellee to the lands in controversy in this case.

Sixth. In not holding and deciding that section 32, township 15 south, range 8 east, except the southeast quarter (¼) of the northeast quarter (¼) of said section was known mineral lands of great value at the date of the approval of the act of Congress approved July 16th, 1894, entitled, "An act to enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States."

Seventh. In not holding and deciding that the said land, being known mineral land at the date of the said grant, did not pass to the State of Utah under its enabling act.

Eighth. In reversing the decree of the United States District Court for the District of Utah made and entered on the 16th day of February, A. D. 1914, and remanding said case to the United States District Court for the District of Utah with instructions to said court to render a decree for the appellee herein.

Ninth. In not sustaining the decree of the United States District Court for the District of Utah in this action quieting and con-
171 firming the title in the United States to the lands mentioned and described in said decree.

Tenth. In holding and deciding that the certificate of purchase from the State of Utah to the appellee herein and to his predecessors in interest operated to confer upon appellee, or his predecessors in interest, any legal or equitable title to said lands, or any interest whatsoever therein as against the United States.

Wherefore appellant prays that the decision and decree of the Circuit Court of Appeals herein may be reversed, and that appellant have an adjudication and decree in its favor affirming the decree of the United States District Court for the District of Utah herein.

WILLIAM W. RAY,
Solicitor for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 10, 1916.

Order allowing appeal to Supreme Court U. S.

It is hereby ordered that the appeal in the above-entitled cause to the Supreme Court of the United States be, and is hereby, allowed as prayed.

WALTER H. SANBORN,
United States Circuit Judge Eighth Circuit.

Dated January 10th, 1916.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 10, 1916.

172 In the United States Circuit Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
FREDERICK A. SWEET, ADMINISTRATOR OF THE ESTATE OF Arthur A. Sweet deceased, appellee. } Citation.

To Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the United States of America is appellant and you are appellee, to show cause, if any there be, why the decree reversing

the judgment of the United States District Court for the District of Utah in the above-entitled case, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter H. Sanborn, judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 10th day of January, A. D. 1916.

WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service accepted and copy received of the foregoing citation this 14th day of January, A. D. 1916.

DICKSON, ELLIS, ELLIS & SCHULDER,
Attorneys for Appellee.

173 (Indorsed:) In the Supreme Court of the United States. No. ——. October Term, 1915. Frederick A. Sweet, Admr., etc., appellant, *vs.* United States of America. Citation on appeal by the United States of America to the Supreme Court of the United States. Filed Jan. 17, 1916. John D. Jordan, clerk.

174 *Clerk's certificate.*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Utah as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased, is appellant and the United States of America is appellee, No. 4298, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation, with acceptance of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit at office in the city of St. Louis, Missouri, this thirty-first day of January, A. D. 1916.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

(Indorsement on cover:) File No. 25,120. U. S. Circuit Court Appeals, 8th Circuit. Term No. 99. The United States, appellant, *vs.* Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased. Filed February 3d, 1916. File No. 25,120.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES, *Appellant*,
v.
FREDERICK A. SWEET, ADMINISTRATOR OF the estate of Arthur A. Sweet, deceased. } No. 99.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal of the United States in this case (R. 166) is from a decree of the Circuit Court of Appeals for the Eighth Circuit (R. 164) reversing a decree of the District Court for the District of Utah (R. 144) quieting title in the United States to 600 acres of a section numbered 32 in Utah which had been sold by the State to the appellee's intestate as school land under its school grant from the United States.

Opinion, C. C. A. (R. 153), 228 Fed. 421.

The case was heard in the District Court upon the Government's bill, alleging that at the date of the

State school grant the land was known mineral land and therefore not granted (R. 1–4), upon the answer of Sweet, denying that the land was mineral and asserting that it was within the grant even if mineral (R. 5–8), and upon testimony as to mineral character taken by an examiner (R. 11–143).

The decree of the District Court, entered without opinion (R. 144) necessarily involves a finding that the land was mineral in character and did not therefore pass to the States under its school grant. The reversal of this decree by the Court of Appeals was upon the ground, as shown in its opinion (R. 153), that the school grant conveyed mineral land. The character of the land in question was not considered (R. 163–164).

The questions presented.

The assignment of errors (R. 165) presents for consideration two propositions which, if successfully maintained, show that the decree of the Court of Appeals is erroneous. The propositions are:

1. The school grant to Utah did not convey known mineral lands.
2. The land in controversy was known mineral at the time the school grant became effective.

The questions of law and fact necessary to the consideration of these propositions will be presented in the argument.

ARGUMENT.

I.

The School Grant to Utah did not Convey known Mineral Lands.

Section 6 of the Utah Enabling Act of July 16, 1894 (28 Stat. 107, 109), reads as follows:

> That upon the admission of said State into the Union,[1] sections numbered two, sixteen, thirty-two and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act

[1] The State was admitted to the Union by proclamation of the President, in accordance with section 4 of the act, on January 4, 1896 (29 Stat. 876).

> until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

The Court of Appeals held that this was an unqualified grant of the designated sections regardless of their character, that the language to that effect was so clear as not to admit of construction, and that to exclude mineral lands from its operation would amount to a judicial amendment of the Act, by adding words of exception which Congress had not seen fit to insert (R. 155–156).

Our contention is that Congress made this grant in full view of sections 2318 and 2319 of the Revised Statutes, which created the mineral exception, as follows:

> SEC. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.
>
> SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. * * *

These provisions, originating in the Act of July 26, 1866 (14 Stat. 251, § 1), as amended by the Act of May 10, 1872 (17 Stat. 91, § 1), formulated in terms of general law a uniform policy for the future reservation and disposition of all mineral lands in the public land states, other than Michigan, Wisconsin and Minnesota, which were excepted by the Act of February 18, 1873 (17 Stat. 465, R. S.

§ 2345). Missouri and Kansas were excepted by the Act of May 5, 1875 (19 Stat. 52), and Oklahoma by the Act of March 3, 1891[1] (26 Stat. 989, 1026, § 16).

In *Deffeback* v. *Hawke*, 115 U. S. 392, 402 (decided Nov. 16, 1885), it was held that lands in Dakota Territory known to be valuable for minerals were reserved from acquisition under the townsite law, and the court by Mr. Justice Field said:

> The provisions of the act of 1872, with the exceptions made by the act of 1873, were carried into the Revised Statutes, which declare the statute law of the United States upon the subjects to which they relate, as it existed on the 1st of December, 1873. * * *
>
> Turning to that portion of these statutes treating of mineral lands and mining resources, which is contained in chapter six of title XXXII, we find that its first section declares that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." § 2318. Title, therefore, to lands known at the time to be valuable for their minerals, could only have been acquired after December 1, 1873, under provisions specially authorizing their sale, as found in these statutes, except in the States

[1] The mineral laws were subsequently extended over that portion of the Oklahoma lands ceded by the Wichita Indians (Act of March 2, 1895, 28 Stat. 899) and the unappropriated lands of the Comanche, Kiowa and Apache Indians. Act of June 6, 1900, 31 Stat. 680; 32 L. D. 95; 34 L. D. 54.

> of Michigan, Wisconsin, and Minnesota, and after May 5, 1876, in the States of Missouri and Kansas.

In *Davis, Adm'r* v. *Weibbold*, 139 U. S. 507, 516 (decided April 6, 1891), the decision in *Deffeback* v. *Hawke* was approved and Mr. Justice Field, again speaking for the court, with reference to lands in Montana, said:

> The Revised Statutes, which embody the law of the United States in force on the first of December, 1873, in its treatment of mineral lands, provided that "in all cases lands valuable for minerals" should be reserved from sale, except as otherwise expressly directed by law (§ 2318); but at the same time repeated the declaration, that all valuable mineral deposits in lands belonging to the United States should be free and open to exploration and purchase. § 2319. After that date title to mineral lands, known at the time to be valuable, could only be acquired under provisions specially authorizing their sale, except in certain States, which exception does not affect the question now before us.

That this mineral reservation by the general law applies to the case of a subsequent state school grant of designated sections in which mineral lands are neither expressly excepted nor granted is clearly to be inferred from the decision in *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, decided in 1880. That case goes even further, for it enforces the mineral exception to such a grant made in 1853, mainly

upon the ground that the general mining law of 1866 was but the declaration of a previously settled policy to reserve mineral lands from all grants. The grant to California of sections 16 and 36 for public school purposes, made in section 6 of the Act of March 3, 1853 (10 Stat. 244, 246), neither granted nor excepted mineral lands in specific language although other parts of the Act, providing for survey and preemption, and granting other lands, did contain such exception. The question was whether the school grant of designated sections without expressly excepting mineral lands conveyed such lands, and the decision was that it did not. The opinion delivered by Mr. Justice Miller, after reviewing the history of the times from 1849 to 1866 bearing on this subject, contains the following (p. 174):

> As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted in 1866 a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States.
>
> Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from preemption, and above all from grants, whether for railroads, public buildings,

> or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes besides the sixteenth and thirty-sixth sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.
>
> It follows from the finding of the court and the undisputed facts of the case, that the land in controversy being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school-section grant.

In *Mullan* v. *United States*, 118 U. S. 271, 276 (decided May 10, 1886), the exception of mineral lands, established in the *Mining Co.* case with respect to the California school grant of designated sections, was enforced in the case of indemnity selections authorized by the same Act and known at the time of selection to be valuable for coal. The court by Mr. Chief Justice Waite said (p. 276):

> The important question in this case is whether the land, being coal land, was open to selection by the State as lieu school land. This was most elaborately considered by the circuit judge, and his opinion, reported in *United States* v. *Mullan*, 7 Sawyer, 466, leaves little to be said on the subject. In *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, this court decided that "the grant of the sixteenth and thirty-sixth sections of public land to the State of California for school purposes, made by the act of March 3, 1853, was not intended

> to cover mineral lands. Such lands were by the settled policy of the general government excluded from all grants" at that time, and we quite agree with the circuit judge that "if sections 16 and 36, being mineral lands, do not pass by the terms of the statute, there certainly is no good reason for permitting the same kind of lands to be selected under § 7, in lieu of sections 16 and 36."

The decision in the present case was filed in the Court of Appeals September 27, 1915 (R. 164, 228 Fed. 421). On November 15, 1915, the same court, differently constituted,[1] decided in *Milner* v. *United States*, 228 Fed. 431, 439, that mineral lands were excepted by section 2318 of the Revised Statutes from the grants made in sections 8 and 12 of the Utah Enabling Act (28 Stat. 109, 110) for university and other public purposes. These sections, equally with section 6 of the Act granting designated sections for public school purposes, contain no exception of mineral lands. For this reason the decision in the *Milner* case is contrary to the decision in this case upon the controlling question. That question is whether section 2318 of the Revised Statutes, enacted in 1873, is effective to create an exception of

[1] The *Sweet* case was decided by Circuit Judges Sanborn and Carland and District Judge Lewis, and Judge Sanborn wrote the opinion. The *Milner* case was decided by Circuit Judge Carland and District Judges Amidon and Van Valkenburgh, and Judge Carland wrote the opinion. There was no dissent in either case. The *Milner* case has also been appealed to this court, and numbered 338 on the docket for this term.

mineral lands from a public land grant in 1894 which contains no such exception. The court in the present case holds that it is not, as to any granted lands. The court in the *Milner* case holds that it is, as to granted lands to be selected. In the *Milner* case it was said (228 Fed. 431, 439):

> Section 2318, R. S. U. S. (Comp. St. 1913, § 4613), provides:
>
> "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."
>
> We held in *Frederick A. Sweet, Administrator,* v. *United States,* 228 Fed. 421, that under section 6 of the act of July 16, 1894, (28 Stat. 109), which specifically granted sections 2, 16, 32, and 36 in every township of the proposed State of Utah, mineral lands passed to the State of Utah. We think, however, the case at bar is clearly distinguishable from that case. Section 6 granted specific lands without qualification or exception, and we were of the opinion that to hold that mineral lands were excepted therefrom would be to interpolate into the section by interpretation language that Congress did not choose to use. In the present case, however, the lands are not specified in the statute, but so many thousand acres are granted to the proposed state, to be selected as stated in this opinion, and we conclude that the certification of these lands by the Secretary of the Interior did not carry mineral lands in direct opposition to section 2318, and the general policy of the United States. It was decided in *Mullan* v. *United*

> *States*, 118 U. S. 271, that section 2318, above mentioned, included coal lands. Congress did not know when sections 8 and 12, *supra*, were enacted, what lands the state would select, and therefore could not have had any particular lands in view. When the Secretary of the Interior came to approve the selections made by the state, he was prohibited by section 2318 from approving the selection of mineral or coal lands.

The attempted distinction between lands in place and lands to be selected is inadmissible. Equally in both cases Congress had no "particular lands in view." Congress did not know in advance of the surveys where any particular designated sections would fall any more than it knew in advance of selection what particular lands would be selected. The grant is the source of title in both cases. Upon completion of the survey in the one case and of the selection in the other, the grant "did not carry mineral lands in direct opposition to section 2318, and the general policy of the United States." As the decision in *Mullan* v. *United States*, 118 U. S. 271, 276, is authority for this proposition in the case of lands to be selected, so the decision in *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, 174, is authority for the same proposition in the case of designated sections. Indeed the former is founded upon and follows the latter.

The point decided in the *Milner* case was also decided the same way by this court in *Montello Salt Co.* v. *Utah*, 221 U. S. 452. That case involved the con-

struction of section 8 of the Utah Enabling Act which granted to the State 110,000 acres of land, to be selected, "and including all the saline lands in said State." It was held that without this express inclusion of saline lands in the grant they would have been excluded by the mineral reservation in section 2318 of the Revised Statutes and the Act of January 12, 1877 (19 Stat. 221), providing for sale of saline lands, and under the uniform policy of the Government relating to such lands. Mr. Justice McKenna, speaking for the court, said (p. 466):

> Under the applicable statutes and uniform policy of the Government saline lands would not have been subject to selection in satisfaction of the 110,000 acre grant in the absence of a special provision authorizing their selection. Rev. Stat., § 2318; Act of January 12, 1877, 19 Stat. 221, c. 18; *Morton* v. *Nebraska*, 21 Wall. 660; *Cole* v. *Markley*, 2 L. D. 847; *Salt Bluff Placer*, 7 L. D. 549; *Southwestern Mining Co.*, 14 L. D. 597; *Jeremy* v. *Thompson*, 20 L. D. 299; *A. H. Geissler*, 27 L. D. 515.

The rulings of the Land Department have been uniform to the effect that grants of school lands made without reference to mineral character, to states in which the mineral laws of the United States are applicable, do not carry mineral lands. This was decided in 1892 with respect to the school grant of 1864 to Nevada (*Keystone Lode & Mill Site* v. *Nevada*, 15 L. D. 259), and in 1898 with respect to the Utah school grant of 1894 now in question. *Utah* v. *Allen*, 27 L. D. 53. See also *State of Utah*, 32 L. D. 117;

Mahoganey No. 2 Lode Claim, 33 L. D. 37; *Charles L. Ostenfeldt*, 41 L. D. 265.

It is to be presumed that when Congress made the school grant to Utah in substantially the terms of the prior grants to California and Nevada, it intended that the language used should be understood in the sense attached to it by the decisions of this court and the settled practice of the Land Department. *Kepner* v. *United States*, 195 U. S. 100, 124; *United States* v. *Hermanos*, 209 U. S. 337, 339. But we need not rest upon this presumption.

Another statute which Congress had in view when it passed the Utah Enabling Act in 1894, and which escaped the attention of the Court of Appeals, was the Act of February 28, 1891 (26 Stat. 796). That Act extended the general grant, contained in section 2275 of the Revised Statutes of indemnity selections to compensate for school sections 16 and 36 granted to any State or Territory and lost for various causes, so as to cover losses occurring by reason of mineral character. The language used for this purpose was the following:

> And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land.[1]

[1] This law was passed upon the recommendation of the Commissioner of the General Land Office to provide a uniform rule for the selection of indemnity school lands. As the Utah school grant covered sections 2 and 32 in addition to 16 and 36, the Act of May 3, 1902 (32 Stat. 188), extended and made applicable to Utah the Act of 1891 (H. Rep. No. 1415, 57th Congress, 1st session).

And language appropriate to carry out the foregoing was added by way of amendment to section 2276 as follows:

> That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur.

This constituted a clear declaration by Congress of its understanding in 1891 that mineral lands were excepted from all school grants to States and Territories in which the mineral laws were applicable. If more be needed to show the same understanding in 1894 it is to be found in the legislative history of the Utah Enabling Act.

Turning to the report of the Committee on Territories of the House, we find that the section of the bill as reported contains the school grant (§6) in the identical language in which it was enacted (H. Rep. No. 162, 53d Congress, 1st session, p. 22). In the body of the report the various provisions of the bill are explained at length under proper heads. Under the head "Grants of Land" the reasons for the various grants, including the public school grant, are given and it is expressly declared (p. 18) that:

> All mineral lands are exempt from any grant made under the Act.

There is no other reference to mineral lands anywhere in the report. In the Senate the Committee on Territories adopted in full the report of the House

Committee (S. Rep. No. 414, 53d Congress, ~~1st~~ 2d session), the same declaration occurring at page 19.[1]

The proceedings on the floor of both chambers have been examined and we find nothing to indicate any doubt about the correctness of the committee statement on this point. The only views touching the character of the granted lands were those expressed as to the propriety of granting four sections instead of two in each township. This was defended on the ground that the granted lands, although intended for agricultural use, were arid and of little value without irrigation (Cong. Rec. vol. 26, pt. 1, pp. 182, 209, 213, 217, 218).

The Court of Appeals in its opinion in this case (R. 157) relied upon the decision in *Cooper* v. *Roberts*, 18 How. 173.[2] In that case it was decided, in 1855, that the school grant by the Michigan Enabling Act of June 23, 1836 (5 Stat. 59), of each section 16 without reference to the character of the land conveyed mineral land. There was at that time no statute reserving or disposing of mineral lands in Michigan. The Acts of March 26, 1804 (2 Stat. 277, 279, 280, §§ 5, 6), and March 3, 1807 (2 Stat. 448, 449, §§ 2, 5), providing for the sale of public lands in the Indiana Territory reserved salt springs and lead mines "for

[1] These reports were referred to in *Montello Salt Co.* v. *Utah*, 221 U. S. 452, 465, as an aid in the construction of the university grant in section 8 of the Utah Enabling Act.

[2] The reaffirmance of this decision in *Roberts* v. *Cooper*, 20 How. 467, and *Minnesota Co.* v. *National Co.*, 3 Wall. 332, was upon the same facts, between the same parties and for the same reasons.

the future disposal of the United States," but also and equally reserved section 16 of each township "for the support of schools." The Act of March 1, 1847 (9 Stat. 146, § 2), made special provision for ascertainment and sale of mineral lands in connection with general provisions for sale of the public lands in Michigan, "excepting and reserving from such sales section sixteen in each township for the use of schools." It was argued that the reservation of school land "from such sales" applied only to sales of public lands other than mineral, but the court held, upon consideration of the language used, that the exception of school land was from all sales, thus indicating the intention to reserve for the use of the State every such section regardless of mineral character (p. 180).

The same Act of 1847 (§ 3) saved rights under mining leases previously made by the Secretary of War, and there had been such a lease made in 1845 embracing the school section in controversy. The section was surveyed in 1847 and returned as containing copper (p. 176); the mining lease which covered it expired "by efflux of time" in 1848 (p. 181); and the Act of September 26, 1850 (9 Stat. 472), repealed the mineral provisions of the Act of 1847 (pp. 180, 181), thus leaving the school section "at that date, disencumbered, and subject to the operation of the compact," the school grant of 1836 (p. 181).

The contemporaneous construction of the Government land officers was also referred to and relied

on by the court. According to their usage prior to 1850 no mineral exception to school grants was allowed (p. 179), and the right to enter the school section in controversy subsequent to the Act of 1850 and in November of that year had been denied because of the school grant (pp. 176, 181).

"It was in these circumstances," as this court has said, referring to *Cooper* v. *Roberts*, "it being found that there was no legal impediment through any legislation, that the court held that the title had passed to the State." *United States* v. *Morrison*, 240 U. S. 192, 203.

II.

The land in controversy was known mineral land at the time the Utah school grant became effective.

Lands known to be valuable for coal are mineral lands within the exception of such lands from a school grant. *Mullan* v. *United States*, 118 U. S. 271, 277.

The time at which the known character of a school section determines the title depends upon the survey. If it was surveyed before the Act went into effect, the question is of its character at that date. If it was surveyed afterwards, the question is of its character at the time of the survey. *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, 175.

This is the rule which has been uniformly applied by the Land Department in the adjustment of all school grants in the mineral land States and specifically to the Utah grant. In the case of *Mahoganey*

No. 2 Lode Claim, 33 L. D. 37, Secretary Hitchcock, referring to the school grant section of the Utah Enabling Act, said:

> Under the provisions of this section the right of the State to the lands mentioned does not attach unless and until identified by the government survey. *State of Colorado*, 6 L. D. 412; *Barnhurst* v. *State*, 30 L. D. 314. And if at that time they are of known mineral character they are reserved from the grant to the State. See *State of Utah* v. *Allen*, 27 L. D. 53; *State of Utah*, 32 L. D. 117.

The same rule has been applied to the similar school grant in South Dakota. *South Dakota* v. *Trinity Gold Mining Co.*, 34 L. D. 485, 486; *South Dakota* v. *Delicate*, 34 L. D. 717, 718, 722; *South Dakota* v. *Walsh*, 34 L. D. 723, 724. Also to the similar New Mexico school grant. *Tillian* v. *Keepers*, 44 L. D. 460, 462.

The time of survey means the time when the survey is completed, and that is when it has been approved by the Commissioner of the General Land Office. *United States* v. *Morrison*, 240 U. S. 192, 210–212; *South Dakota* v. *Delicate*, 34 L. D. 717; *South Dakota* v. *Walsh*, 34 L. D. 723, 724.

The Township embracing section 32 involved in this case was surveyed in the field May 27, 1900 (R. 33), under a contract dated November 24, 1899 (R. 106). The field notes were filed in the office of the Surveyor General January 14, 1901 (R. 106). The survey was approved by the Surveyor General November 2, 1901, and by the Commissioner of the

General Land Office "by his letter 'E' dated March 5th, and June 6, 1902" (R. 106).

The approved township plat showing section 32 as coal land was filed in the local land office at Salt Lake City June 11, 1902, and has remained on file there since that date (R. 104). On this plat the coal sections were indicated by a circle with a cross in the center, and this legend appeared in section 32 (R. 107). The surveyor's field notes of this township, from which the township plat was prepared (R. 106), showed the mineral return of section 32 as follows (R. 33, 107):

> There are numerous indications of coal deposits throughout the township and in the following sections there are sufficient indications to warrant returning the same as coal land; viz., sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 28, 29, 30, 32, and 34, the northwest quarter of section 3 and south half of section 33.

The testimony shows the following:

As early as 1887 or 1888 at least three distinct beds of coal were exposed to view on section 32 in question (R. 43–44, 45, 54, 57, 63). At that time there were two openings showing beds of coal, one six feet and the other five feet six inches thick (R. 47–48, 50, 51, 53, 54, 55, 56, 58, 61). One of these was known as the "Burgess Mine" and the other as the "Wilson Mine," situated about 200 yards apart (R. 54–55). The Wilson mine definitely located on the "left-hand fork" or "south fork"

of Miller Creek Canyon (R. 38, 44, 51, 55, 59, 63, 65, 71) and near the center of the northwest quarter of the section (R. 15, 38, 56), had been worked into about ten feet in 1889 (R. 56, 60, 61, 67). From this mine Wilson extracted coal and hauled it to the town of Price in 1891 or 1892 where it was sold and used (R. 38–39, 47). In 1893 residents in the vicinity had been getting coal from this mine 5 to 8 years (R. 66). In 1894 and 1895 the Williams Brothers ran this entry in 50 to 75 feet, extracted coal and sold it to the people of the Cleveland settlement, situated at a distance of 15 to 18 miles (R 43–48, 50, 53–54). From 1899 to 1903 McFarland took coal from the Wilson Mine for his own use and also sold it to the people of Cleveland (R. 55–56, 68). In 1901 he opened another coal bed about 150 yards below on the same section over 9 feet thick (R. 56–59, 69). He desired to enter it as coal land, but found that it was claimed as state school land (R. 57).

McFarland testified that the coal taken from the Wilson Mine was a "good merchantable coal of good quality" (R. 56). Potter, a coal miner of long experience, testified to the coal as he saw it in 1889: "I formed a conclusion from the face of the entry as to the quality of the coal, and I believe it is the best coking coal there is in the canyon today" (R. 61). Taff, the Government geologist, testified that the coal in the various beds underlying this section was a good bituminous grade without apparent partings or impurities (R. 13, 14–15). Hopkins, the expert

employed by the appellee to examine this land for the purpose of testifying against the Government, testified: "I will say in general that the appearance of the coal looked as if it was of good quality" (R. 140).

The appellee is president of the Consolidated Fuel Company (R. 136, 142), which, at the time of the trial, was conducting extensive coal mining operations about one-half to three-quarters of a mile distant in section 29 on the same coal beds and in the direction of section 32 (R. 85, 19, 27, 44, 52, 53, 55, 59, 63, 84–85). As to this Taff testified (R. 27):

> The exposure of coal in section 29 that was being opened for a new mine when the lands were examined in July, 1909, is a short distance south of the center of the northwest quarter of section 29. If the tunnel in section 32 was extended to the north it would open into the canyon in the immediate vicinity of the new mine opened in the northwest quarter of section 29, and if the mine on the lowest coal, as located in the corner of the northwest corner of section 29 was extended southward toward the tunnel opened in the side of the canyon in the north half of the southwest quarter of section 32 it would connect therewith, since the coal in both mines are from the same bed. It would be practically on a horizontal. If a body of coal workmen were engaged in extracting coal, one starting from the entry on section 29 and proceeding south, and another body of workmen engaged in extracting coal starting at the entry on section 32 were pro-

> ceeding north, they would meet each other, and without any reasonable question there would be a straight tunnel in the coal from one section to the other of about three quarters of a mile in length. If the coal extraction could be continued south of the east side of section 32 from the north bed it would have an exit in certain mines located in the east side of the southeast quarter of section 8 in Cedar Creek Canyon where the identical bed is exposed and has been mined; and men working south would meet men working north from Cedar Creek Canyon, and you would have a horizontal plane, a straight tunnel of coal about two and a half miles in length.

In 1887 or 1888, as W. B. Williams testified, referring to the vicinity of section 32 (R. 43): "The coal company was taking up coal land over there everywhere."

This land was examined by the Government geologists in 1906 and again in 1909 with the special object of investigating the occurrence of coal, each 40-acre tract of section 32 being examined for the purpose of determining its character (R. 12–13). It was practically in the same condition in 1909 as in 1906 (R. 24). The three openings testified to by numerous witnesses as having been made years before were encountered and closely examined. The result was shown by the testimony of Geologist Taff, who headed both expeditions, as follows (R. 14–15):

> My reasons for testifying that all the lands contained in this section are coal lands are; in the first place, the coal crop, or in other

words, the edge of the coal beds where it comes to the surface, was traced continuously through this township and through this section 32, Township 15, South of Range 8 East, and in that tracing of that crop of the lowest workable coal bed, we came in contact with a mine that had been previously located and where coal had been worked, in the southeastern part of the northeast quarter of the northwest quarter of section 32. I will refer to my notes for all the details of this coal bed. At this locality a tunnel had been driven toward the north of the coal beds for a distance of fifty feet. A tunnel, drift or entry had been opened, and at the face the coal bed was shown to be ten feet and four inches thick. It was coal without any parting or impurities with respect to the quality of the coal bed. This working is in the southeast part of the northeast quarter of the northwest quarter of section 32. At this first coal bed the entry was about fifty feet in length. The coal was without partings—material partings—or impurities that would affect its quality, and appeared to be a good grade of coal throughout the entry. A section of coal ten feet four inches thick showed the length of the entry, from the opening to the face of the mine. I might state that the mine was not in operation at the time, but the conditions there show that all of the coal had been removed and taken away from the vicinity with the exception, of course, of a small amount of slack that was thrown out on the dump at the opening of the mine. I should imagine it was ten or twelve feet wide and

ten feet six inches high. It is about fifty feet long. The coal had been already mined and taken away from the country with the exception of a small amount of slack. A short distance to the west of the first in the same legal subdivision, and about fifty feet higher in the section, was a second bed of coal. At this place an entry had been driven to a distance of a hundred and fifty feet in a direction thirty degrees west. The section of coal at the opening and face was five feet of clear coal of good bituminous grade. As at the mine on the lower bed, all of the coal that had been taken from the mine had been removed with the exception of a small amount of slack. In this case the entry and height of coal was five feet, and an ordinary width, I would estimate, of probably ten feet and one hundred fifty feet in length. There was no large chamber that I saw in this second mine.

I can give an estimate of the amount of coal taken from these mines, but it is only an estimate, as follows: The mine on the lowest coal first mentioned has had removed approximately two hundred tons; the mine on the second coal bed has had removed a little over three hundred tons. I know of no chamber or chambers in these tunnels. There is a third bed of coal occurring about ninety feet above the second, and has been prospected a short distance northwest of the second mine further up the slope. This was a shallow pit showing a clear face of the coal exposed in the bed which was six feet two inches thick of clear coal. By clear coal I mean without

apparent impurities and of good quality. The opening was just a pit; a prospect pit showing the face of the coal. These three are the only openings of coal that we found on the section at the time this investigation was made. The pit is toward the central part of the northwest quarter of section 32, Township 15, South of Range 8 East.

And again (R. 16):

At numerous places in the vicinity, both to the north and the south the coal beds are exposed naturally in gullies and on the slopes of the hills in addition to the exposure of the prospect and the mines. These various coal beds in their numerous exposures, were noted and examined particularly at the time the surveys were made, for the purpose of classifying the coal lands, and in connection with the work the outcrops of the coal and associated rocks were traced and located and measured instrumentally so at all times there is no question as to the proper locations. The instrumental surveys locating claims being checked by the location of section lines and section corners in the vicinity of the coal outcrops. Not only was this coal bearing formation with its coal beds traced north and south from section 32, Township 15, South of Range 8 East, along the slopes of the Wasatch Plateau, but they were traced westward toward Huntington Canyon, and then northward and northwestward, so that the formation is exposed with numerous coal prospects entirely around, and then for miles on all sides of section 32 in question.

Four distinct coal beds were found underlying section 32 with a total thickness of 28 feet (R. 84). Three of these were found to be workable and could be worked contemporaneously (R. 27). This section was estimated to contain 14 million tons of coal (R. 21). It was not necessary to sink shafts or drill holes to find the coal. The canyons were found to have "cut down through the coal bearing rocks to and through the coal beds" (R. 29). As Taff testified (R. 30):

> So that from the present numerous outcrops in certain area, for instance, in the vicinity of section 32, the various exposures of coal serve the same purpose that numerous shafts or drill holes would serve in determining the coal character of this land. If these coal deposits in this vicinity were entirely concealed by superimposed beds and numerous drill holes had been put down at these localities where these openings and prospects and exposures now are, it would be determined by those who were conversant with coal conditions, that the proof is ample showing the extent of the coal beds through the specified area.

The larger part of the southeast quarter of the northeast quarter of the section was found to lie below the coal beds (R. 16), so that this 40-acre tract was not regarded as valuable for coal (R. 13, 102). It was accordingly omitted from the decree, which covered only the other 600 acres (R. 144).

The testimony for the Government is practically undisputed. The appellee's experts admitted the

existence of three beds of coal in the section, one of which was "in the neighborhood of ten feet thick" and "looked as if it was of good quality" (R. 133, 134, 140). The theory of the defense seemed to be that because of the lack of present transportation facilities the land was more valuable for timber and grazing than for coal (R. 134–135). The land is rough and unfit for agriculture (R. 33). It is cut up by numerous canyons (R. 29–30). In 1904, when it was sold by the State, it had some saw timber on it which had been culled out, and it was considered good grazing land (R. 35, 37).

In view of the character and quantity of this evidence, if the Court of Appeals had reached the question, it must have affirmed the decision of the District Court that the land in controversy was known to be valuable for coal when the Utah school grant became effective. *Mullan* v. *United States*, 118 U. S. 271, 272, 277; *Diamond Coal Co.* v. *United States*, 233 U. S. 236, 241–249.

CONCLUSION.

As the Utah school grant did not convey known coal lands, and as the 600 acres of section 32 in controversy were known to be valuable for coal when the grant became operative, the decree of the Circuit Court of Appeals should be reversed and the decree of the District Court should be affirmed.

Respectfully submitted.

FRANCIS J. KEARFUL,
Assistant Attorney General.

DECEMBER, 1917.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 99.

THE UNITED STATES, Appellant,

vs.

FREDERICK A. SWEET, Administrator of the Estate of Arthur A. Sweet, Deceased, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEE.

The appellee has not been furnished with the brief of the appellant in this cause, and therefore is not in a position to reply at this time to any contentions which may be made on behalf of appellant in this court different from the points raised in the Court of Appeals, from which this appeal is taken. We are compelled, therefore, in discussing the case on behalf of the appellee, to make a complete statement of the issue in this court, as we understand it, and it

may be that in so doing we may be compelled to cover ground which we would not cover were we in possession of the contentions of appellant in this court.

This is a suit brought by the United States to determine the title to all of Section 32 of Township 15 South, Range 8 East, Salt Lake Meridian, containing 640 acres of land, in Carbon County, Utah.

Statement of the Case.

On July 16, 1894, Congress passed the act (28 Stat., 107) entitled, "An Act to enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the Original States," commonly called and hereinafter referred to as the Utah Enabling Act, a complete copy whereof is hereto appended for the convenience of the court.

The convention which subsequently assembled accepted that act, and the people ratified it by the adoption of the constitution of the State on November 5, 1895, and with that constitution the State was admitted into the Union by presidential proclamation January 4, 1896.

Section 6 of the Utah Enabling Act provided:

> "That upon the admission of said State into the Union sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State * * * are hereby granted to said State for the support of common schools."

On November 5, 1904, the State of Utah, through its Land Board fully authorized so to do, contracted to sell said Section 32 above described to George T. Badger, as school lands, for the sum of one thousand nine hundred twenty dollars ($1,920.00). Thereafter and on December 29, 1906, said Badger sold, assigned and transferred to Arthur A. Sweet the above-mentioned contract and all his right, title and interest in and to said land. Thereafter

said Sweet paid to the State of Utah the one thousand nine hundred twenty dollars ($1,920.00) for said section of land, and was demanding his deed from the State, when, on January 22, 1907, for the first time, the United States by this suit in equity sought to revoke its grant of that section and recover the land.

Said Sweet having died pending the litigation, the suit was continued by bill of revivor against appellee as his administrator.

The United States recovered judgment in the District Court of Utah which, on appeal to the United States Circuit Court of Appeals for the Eighth Circuit, was reversed with directions to the trial court to enter a decree for defendant appellee.

Thereupon the United States prosecuted this appeal to this court.

The Questions Presented.

The complaint alleged that the grant of said school sections to the State of Utah by said Enabling Act was not intended to cover mineral lands, and that such lands were, by the settled policy of the general government, excluded from the said grant contained in said Enabling Act, and that the particular section in question here was well known mineral lands, namely, coal lands chiefly valuable on account of the deposits of coal therein.

The answer denied those allegations.

Hence, are presented two issues, one of law, and one of fact, viz:

1. Were mineral lands excluded from the grant of the school sections under the Enabling Act?

2. If so, were the lands in question mineral in character?

Obviously, if the first inquiry is answered in the negative, such conclusion renders the consideration of the question whether or not the lands in controversy were known to be valuable for mineral immaterial, and it would be useless to discuss it.

ARGUMENT.

By the terms of the Enabling Act under which the State of Utah was admitted into the Union, the grant by the United States to the State of Utah of Sections two, sixteen, thirty-two and thirty-six, for the support of common schools, was an absolute grant, without any reservation whatever of mineral lands, and the title of the State of Utah to those sections, for school purposes, is absolute, no matter whether such lands were at the time of the grant known to contain valuable minerals or not.

The first inquiry is merely one of statutory construction, and is within a very narrow compass. It would seem that the simple reading of the Act would be a sufficient reason for sustaining the ruling of the Court of Appeals, because, in the language of this court in *Motion Picture Patents Co. vs. Universal Film Mfg. Co.*, 61 U. S. (L. Ed.), 416, at page 419:

> "It is so plain that to argue it would be to obscure it."

The discussion of this question presents the following propositions:

I.

Section 6 of the Enabling Act contains no reservation of mineral lands.

Section 6 of the Enabling Act provides:

> "That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less

than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the Legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grant or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain."

An analysis of that section discloses that the enumerated sections passed absolutely to the State unless they were embraced in permanent reservations for national purposes or Indian, military, or other reservations of any character, and therefore withdrawn from the public domain, in which event they were not to pass until such reservations should have been extinguished and such lands restored to and become a part of the public domain.

It will be observed that nowhere in this section do we find any exception or reservation of mineral lands. There is absolutely no mention whatsoever of mines or mineral lands.

Congress enumerated with great particularity the exceptions. The language or words of exception are clear beyond cavil. No mention is made of mineral lands. There are no such words of exception in this granting section.

The maxim is: *expressio unius est exclusio alterius.*

The mind of Congress was fixed upon the subject of exceptions to the grant and it expresses no exclusion of mineral lands.

As we shall show, Congress never intended to except mineral lands from the grant; but if it so intended, neverthe-

less, as said by Sanborn, J., in *U. C. Life Ins. Co. vs. Champlin*, 116 Fed., 858, at page 860:

> "There is nothing in the law which it enacted to evidence any such intention, while *the striking omission to express it raises the legal presumption that it did not exist, and forbids the courts from importing it into the law and giving it effect.*"

II.

A consideration of the entire statute enforces the idea that no exception of mineral lands was intended by Congress.

In addition to what we have said respecting Section 6 of the Act, it is very significant that *nowhere in the Enabling Act, from beginning to end, do we find any mention whatever of mines or mineral lands, and no reservation or exception of mineral lands is contained in that Act, with respect to other land grants to the State of Utah.*

Moreover, there is no provision contained in the Enabling Act, either in section 6 or any other section thereof, for the selection by the State of Utah of any other equivalent land in lieu of mineral lands, in case it should be ascertained that the lands granted for school purposes contained mineral at the date of the taking effect of the grant to the State. And as said in *United States vs. Delaware, etc., Co.*, 213 U. S., 366, at page 414:

> "We think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it."

In fact, no provision is made for any indemnity lands, except as to such lands, embraced within the school sections, which may have been sold, or otherwise disposed of, under the authority of Congress, at the time the grant took effect; and wherever these sections were embraced in any permanent reservation for national purposes, or in Indian, military, or

other reservations of any character, they were not subject to any indemnity provisions of the act, but the operation of the grant was suspended until, by the extinguishment of such reservation, such lands should be restored to, and become a part of, the public domain.

There would seem to be no room for contending that Congress intended, in employing the language which it did in the Utah Enabling Act, to make any reservation of mineral lands, whether known or unknown, in its grant to the State of Utah of these sections for the support of the common schools.

Indeed, section 10 of the Enabling Act would seem to forever close the door to any reasonable contention that any such intention to reserve mineral lands from that grant was ever contemplated, or at all considered by Congress. That section of the Enabling Act is as follows:

> "SEC. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only."

From this it is seen that, by virtue of the express provisions of section 10 of the Enabling Act, under no circumstances could any of these school sections be subject to entry under the pre-emption, homestead, or any other land law of the United States. It must be conceded that title to coal lands, found within the public domain, can only be acquired by entry under the land laws of the United States (U. S. R. Stats., sections 2347, 2348). It is, of course, futile to claim that the mineral lands are not entered under the land laws of the United States. Under section 10 of this act, no one could acquire these sections, and they would forever remain

in the United States unless some means were devised to abrogate or alter that provision of the Statehood compact.

Unless the provisions of section 10 of the Enabling Act are entirely disregarded and emasculated it would seem to inevitably follow that Congress not only intended to grant, without reservation whatever, to the State of Utah, these sections for school purposes, but likewise intended to close forever the door to any contention to the contrary.

III.

The Enabling Act provided for the formation of a State Constitution, and the admission to Statehood upon the condition that "all the provisions of this act have been complied with in the formation thereof" (section 4), to be evidenced by the presidential proclamation.

The State constitution so formed provided in section 3 of Article X thereof that:

> "The proceeds of all lands that have been, or may be granted by the United States to this State, for the support of the common schools; the proceeds of all property that may accrue to the State by escheat or forfeiture; all unclaimed shares and dividends of any corporation incorporated under the laws of this State; the proceeds of the sale of timber, *minerals*, or other property from *school* and State lands, other than those granted for specific purposes; and the five per centum of the net proceeds of the sales of public lands lying within the State, which shall be sold by the United States subsequent to the admission of this State into the Union, shall be and remain a perpetual fund, to be called the State School Fund, the interest of which only, together with such other means as the legislature may provide, shall be distributed among the several school districts according to the school population residing therein."

Clearly the framers of that instrument construed the Enabling Act as granting to the State absolutely the school

sections enumerated even though they were mineral in character, because otherwise they had no right to provide for the sale of *"minerals"* from *"school"* lands.

The proclamation of the President of the United States accepted that constitution containing that provision as a compliance with the act. Hence he, as the executive head of the Government, officially acquiesced in that construction of the Enabling Act. Plaintiff should, therefore, now be estopped from attempting to repudiate that construction.

IV.

Read by itself, the Enabling Act contains no reservation, express or implied, of mineral lands. The Court cannot create such reservation.

It is clear from the foregoing that the Enabling Act read by itself contains no reservation, express or implied, of mineral lands. It is not claimed, as we understand it, by the Government, that there is anything in the Enabling Act or any section thereof which, directly or indirectly, contains any exclusion of mines or mineral lands, whether known or unknown, from the operation of the grants therein contained. The complaint does not so allege, and the language of the Enabling Act itself is directly to the contrary.

In addition to the constitutional construction of the Enabling Act heretofore set forth, the State, as early as January, 1898, claimed that mineral lands passed under the school-section grant. The Secretary of the Interior held to the contrary in *Utah vs. Allen*, 27 L. D., 53, a ruling we shall hereafter comment upon. But even in that case he ruled and said at page 55:

> "Read by itself, it is true, as contended by the State, that the grant in question contains no reservation therefrom, either express or implied, of mineral lands."

That is necessarily true. *United States vs. Hartwell*, 6 Wall. (73 U. S.), 385, 395.

The words in the act itself are clear and unequivocal, and, as said in *Motion Picture Patents Co. vs. Universal Film Mfg. Co.*, 61 U. S. (L. Ed.), 416, at 418:

> "Their meaning would seem not to be doubtful if we can *avoid reading into them that which they really do not contain.*"

And again:

> "We are not at liberty to supply by construction what Congress has clearly shown its intention to omit."
>
> *Cary vs. Donohue*, 240 U. S., 430; 60 L. Ed., 726, 729.

The act is plain on its face. The grant is absolute in terms. Is the court going to engraft such a reservation into the statute? As said in *Howard vs. Illinois Central Ry.*, 217 U. S., 463; 52 L. Ed., 297:

> "This would require us to write into the statute words of limitation and restriction not found in it."

It is fundamental that:

> "An express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions, *the court will not curtail the former nor add to the latter by implication.*"
>
> *Sutherland Stat. Con.*, Sec. 328.

Again:

> "Where the legislative body makes no exception to a general and clear declaration of its will, the *conclusive presumption is that it intended to make none*, and it is not the province of the courts to do so."
>
> *United States vs. Mo. Pac. Ry.*, 213 Fed., 169, 173.

So this court long ago ruled that:

> "Where the legislature makes a plain provision without making any exception, *the courts of justice can make none, as it would be legislating to do so.*"

So, also, it is said:

> "*We cannot insert the exception. When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.* 'We are bound,' says Justice Buller in *Jones vs. Smart*, 1 T. R., 44, 'to take the act of Parliament as they have made it;' and Mr. Justice Story, in *Smith vs. Rives*, 2 Summer, 338, 354, 355, observes, 'It is not for courts of justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation.'"
>
> *Hobbs vs. McLean*, 117 U. S., 567, at 579, 580.

How appropriate, therefore, the language of the Court of Appeals in this case (Record, pp. 155, 156):

> "The United States now asks the courts to amend section six by adding thereto the words 'nor shall any mineral lands be subject to the grant or the indemnity provisions of this section,' and thereby to revoke the grant of the mineral lands in sections two, sixteen, thirty-two and thirty-six clearly made by the terms of the sections. But such an amendment and revocation would be violative of the settled canons of construction and established principles of law. The Enabling Act is clear, free from even the shadows of an ambiguity. And when a statute is plain and its meaning is certain, construction has no place or office. The conclusive legal presumption is that the legislative body meant what it said and the duty of the courts is to give effect to its acts, not to amend or repeal them. *Brun vs. Mann*, 151 Fed., 145, 157; 80 C. C. A., 513, 525; *United States vs. Ninety-nine Diamonds*, 139 Fed., 961, 964; 72 C. C. A., 12; *Johnson vs. Southern Pac. Co.*, 117 Fed., 462, 465; 54 C. C. A., 508, 511; *Swarts vs. Siegel*, 117 Fed.,

13, 18, 19; 54 C. C. A., 399, 404, 405; *St. Paul, M. & M. Ry. Co. vs. Sage*, 71 Fed., 40, 47; 17 C. C. A., 558, 565; *Webber vs. St. Paul City Ry. Co.*, 97 Fed., 140, 144; 38 C. C. A., 79, 83; *Grainger and Co. vs. Riley*, 201 Fed., 901, 904; 120 C. C. A., 415, 418; *United States vs. Alamogordo Lumber Co.*, 202 Fed., 700, 706; 121 C. C. A., 162, 168; *First Nat. Bank vs. United States*, 203 Fed., 374, 377, 378; 124 C. C. A., 256, 259, 260; *Soliss vs. General Electric Co.*, 213 Fed., 204, 207; 129 C. C. A., 548, 551.

"Congress had the power to make or to withhold this grant in whole or in part. It had absolute power to preserve or except from the grant a part of or all the mineral lands in the State. Its attention was unavoidably called to the exceptions to the grant it would make, for it expressly provided in section six that lands in permanent reservations for national purposes should be forever excepted from the grant and that lands in Indian, military and other reservations should be excepted until the reservation was extinguished. Nevertheless, it did not except or reserve mineral lands from the grant. And where a legislative body makes a plain grant or provision and makes no exception to it, the legal presumption is that it intended to make none and it is not the province of the courts to do so. *A fortiori*, it is true that, where a legislative body has made a grant or a provision and has itself carefully considered and specified the exceptions to it, the courts may not lawfully strike out the exceptions made or add others which the enacting body excluded. Such a proceeding would pass the bounds of construction and would constitute reprehensible judicial legislation. Hobbs *vs.* McLean, 117 U. S., 567, 569; Maxwell *vs.* Moore, 22 Howe, 185, 191; Sutherland on Statutory Construction, Sec. 328; Cella Commission Co. *vs.* Bollinger, 147 Fed., 419, 425; 78 C. C. A., 467, 473; Omaha Water Co. *vs.* City of Omaha, 147 Fed., 1, 13; 77 C. C. A., 267, 279; Chicago, M. & St. P. Ry. Co. *vs.* Westby, 178 Fed., 619, 631; 102 C. C. A., 65, 77; American Grain Separator Co. *vs.* Twin City Grain Separator Co., 202 Fed., 202, 205; 120 C. C. A., 644, 647; United States *vs.* Alamogordo Lumber Co., 202 Fed., 700, 706; 121 C. C. A., 162, 168; United States *vs.* Mo. Pac. Ry. Co., 213 Fed., 169, 173; 130 C. C. A., 5, 9."

V.

The contention of the Government is that, notwithstanding the grant of these school sections to the State of Utah is absolute and without reservation or exception, except as set forth in section 6, above quoted, and notwithstanding that there is no mention made in the Enabling Act of any reservation of minerals whatsoever, still it was the intention of Congress, when it passed the Enabling Act, to exclude from the grants therein contained all known mineral lands which at the date of the grant existed in or upon any of these school sections, and this upon the theory that it is, and has been, the settled policy of the Government of the United States not to grant its known mineral lands for any purpose, but to reserve and except the same from all grants to the several States.

Appellant's claim is well stated in the opinion of the Court of Appeals (Record, pp. 156, 157), as follows:

> "Counsel for the United States seek to escape from the conclusion which the rules and principles to which reference has been made seem to compel, on the grounds that it is the settled public policy of the Government to reserve mineral lands from sales and grants; that section 2318 of the Revised Statutes provided that 'In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law;' that the act of May 10, 1872, 17 Stat., 91, section 1, declared that all valuable mineral deposits in lands belonging to the United States should be 'free and open to exploration and purchase and the lands in which they are found to occupation and purchase;' that the Supreme Court held in Mining Co. *vs.* Consol. Mining Co., 102 U. S., 167, that the mineral lands in California were excepted from the grant to that State by the act of March 3, 1853, 10 Stat., c. 145, pp. 244, 246, of sections sixteen and thirty-six in each township for public schools and that in Deffeback *vs.* Hawke, 115 U. S., 392, that court held that the title of a claimant of a placer mine was superior to the claimant of

> a townsite in view of the provisions of the act of May 10, 1872, section 2318, Rev. Stat., and the townsite laws which expressly except mineral lands. Sections 2392, 2386, Rev. Statutes."

But again, as said in that opinion (Record, p. 157):

> "There are many reasons why the contention that the courts should amend section six and revoke a part of the grant it so clearly makes on the ground that the settled public policy of the United States is to except mineral lands from its grants ought not to prevail."

VI.

How the Policy of the Government is Determined.

How is the settled policy of the general Government to be ascertained and determined?

We understand the rule to be that the policy of the Government is found in its statutes; or, if the statutes have not directly spoken, then in the decisions of the courts and the constant practice of the Government officials.

The common schools have always been the subject of the bounty and generosity of the Government, before even the adoption of the Federal Constitution. Under the ordinances of 1785 and 1787, it was declared to be the fixed and cherished object of the people to provide educational facilities, in order to advance the cause of good government, morality and religion, and, without deviation since, whenever new States have been created, land grants, for the purpose of aiding and fostering the common schools, have been made to the States upon their induction into the Union.

This bounty and generosity of the Government is one of the compacts between it and the newly created States, and anything which would interfere with or curtail the grant to the State of lands for the use of the common schools, would be looked upon not only as a misfortune but

as a violation of the solemn duty owing by the general Government to the newly created States and as destructive, in part, of the common-school system. And we submit that no interpretation or construction should be given to any statute which would result in depriving the common schools of the bounty intended to be conferred upon them by the general Government, unless the statute, in and of itself, contains language which imperatively impels such interpretation or construction.

As said by Mr. Justice Campbell, in the case of *Cooper vs. Roberts*, 18 How., 173, at page 177:

> "The practice of setting apart Section No. 16 of every township of public lands, for the maintenance of public schools, is traceable to the ordinance of 1785, being the first enactment for the disposal by sale of the public lands in the Western territory. The appropriation of public lands for that object became a fundamental principle, by the ordinance of 1787, which settled terms of compact between the people and States of the Northwestern territory, and the original States, unalterable except by consent. One of the articles affirmed that 'religion, morality, and knowledge, being necessary for good government and the happiness of mankind;' and ordained that 'schools, and the means of education, should be forever encouraged.'"

And again, at page 178:

> "But the constancy with which the United States have adhered to the policy in the various compacts with the people of the newly-formed States, and the care which Congress has manifested to prevent the accumulation of prior obligations which might interrupt it, fully display their estimate of its value and importance. *There is, obviously, a definite purpose declared to consecrate the same central section of every township of every State which might be added to the Federal system, to the promotion 'of good government and the happiness of mankind,' by the spread of 'religion, morality, and knowledge,'*

> and thus, by a uniformity of local association, to plant in the heart of every community the same sentiments of grateful reverence for the wisdom, forecast, and magnanimous statesmanship of those who framed the institutions for these new States, before the constitution for the old had yet been modeled. Has the discovery of minerals of value upon this section been deemed a sufficient cause for its withdrawal from the operation of this policy, and the compacts which develop it?"

In the same case (20 How., 467, 484, 485), upon a second writ of error to the Supreme Court, Mr. Justice Daniel uses the following language in his concurring opinion:

> "That case (*Cooper vs. Roberts*, 18 How., 173), was elaborately discussed by counsel; was, as the opinion of the court evinces, deliberately considered; the theory and objects of the system adopted by the Government for the distribution of public lands carefully examined, correctly expounded, and properly sustained by the decision. In the reasoning of the court, the cherished objects aimed to be secured by that theory, viz: the advancement of 'religion, morality, and knowledge,' as indispensable for the existence of good government, and for the happiness of mankind; the obligation for the maintenance of schools and the means of education as necessary for the ends proposed, as declared in the third article of the ordinance of 1787, are prominently and correctly set forth as guides in the interpretation and application of the policy and system of the Government in disposing of the public domain. It seems scarcely to admit of rational doubt, that it was in pursuance of this policy, and as deemed best calculated for its successful accomplishment, that in the surveys made or to be made of the public lands, the sixteenth section of every township, being central (and therefore more than any other section could be), connected with the several interests of the township, was appropriated for the use of schools. *Admitting these to be the policy and theory of the Government, designed, as it has been declared, to lay the*

foundation of social and political good, it would seem to follow that nothing short of the highest and most overpowering public consideration, or an absolute inability or want of power, should be permitted to defeat or in any degree to control them. * * *

"The power vested in the President to reserve from sale such portions of land as he should deem necessary *for public use*, may be classed as one of those paramount considerations, constituting a public or national necessity, reaching even to the defense of the country by fortifications or arsenals. In the same category may be placed the sanctimony of the rights of property and possession existing and vested in territories anterior to their acquisition by the United States; rights guaranteed by treaty stipulations. In the same light may be viewed the withholding temporarily from sale lands in which were minerals and salt springs. *All these restrictions or reservations are exceptions merely, and should be carried no farther than their terms expressly or necessarily require. They can with no propriety be regarded as forming in themselves a system; much less as overturning a system designed to be as far as practical general and uniform, and proclaimed from its origin to be founded in wisdom and in a solemn sense of public good, and as such to be fostered and sustained.* Every new State has come and will come into the Union relying on the faith of this pledge; and even upon the concession of a power in the Government to violate that pledge, such a violation could be referred to no principle of justice, and should therefore never be imputed but upon proofs the most positive and unequivocal."

The case of *Roberts vs. Cooper, supra,* involved the question as to whether or not the sixteenth section, known to contain mineral at the time of the grant to the State of Michigan, upon its admission into the Union, passed by the terms of the grant to that State, notwithstanding the mineral character of the land, the contention being that the settled policy of the general Government was to reserve all land containing minerals, and that, therefore, this section did

not pass to the State of Michigan, and it was in discussing this contention that the language above quoted from the opinion was used, the court holding that the grant to the State was absolute, notwithstanding the mineral character of the land.

In that case, as in this, the Enabling Act contained no provision reserving or excepting mineral lands from the operation of the grant.

See, also, to the same effect: *Beecher vs. Wetherby*, 95 U. S., 517.

Accordingly, the Court of Appeals (Rec., p. 157) well says:

> "In the first place *Congress has declared in the Enabling Act itself in plain and positive terms that the public policy of the nation was to grant to the State of Utah Sections two, sixteen, thirty-two and thirty-six in each township in that State, without any exception or reservation from that grant of mineral lands*, for the support of the common schools, and as the Supreme Court said in *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290, 340, 'the public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the Government officials, *but when the law-making power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.*' *Dewey vs. United States*, 178 U. S., 510, 521. The Supreme Court has *twice considered the very question here at issue*, the question whether or not under a like grant of school lands to Michigan without an exception of mineral lands the courts could lawfully enact that exception on the ground that such was the settled public policy of the nation and *has twice decided, after exhaustive arguments, that they could not lawfully do so. Cooper vs. Roberts*, 18 How., 173, 177, 178; *Roberts vs. Cooper*, 20 How., 467, 484, 485; *Minnesota Min. Co. vs. National Min. Co.*, 11 Mich., 186; 3 Wall., 332.'

VII.

In point of fact, there has been no uniform policy on this question.

Again if we look to the Enabling Acts of the so-called public-land States, we find that wherever the mineral land has been excepted from the grants to the State, the Enabling Act contains either an express reservation of the mineral as to the school sections, or in some other part of the Act there is an express reservation of mineral, from which it is clearly evident that it was the intention of Congress to exclude from the operation of the entire grant all land containing known minerals.

For instance, the Enabling Act of Colorado, 18 Statutes at Large, page 476, provides that all mineral lands shall be excepted from the operation of the grants of the Act.

The Enabling Act of the State of Washington, 25 Statutes at Large, page 477, contains a grant of the sixteenth and thirty-sixth sections for school purposes, and expressly provides that if either of these sections shall be found to be mineral lands, they shall not pass to the State, but other lands in lieu thereof may be selected.

(In the case at bar, as we have heretofore seen, the Enabling Act of Utah, granting the four sections to the State for school purposes, contains no provision whatever for the selection of lands in lieu thereof, in case such sections shall be found to be mineral in character.)

The Enabling Act of Idaho, 26 Statutes at Large, page 215, contains a provision as to mineral lands identical with that contained in the Enabling Act of Washington. The same is true of the Enabling Acts of Montana, North Dakota and South Dakota, as well as Wyoming.

The Enabling Act of Wyoming, passed on July 10, 1890, was followed by the Enabling Act of Utah, passed, as we have already seen, on July 16, 1894. In the one case there

was an express reservation of minerals, and in the other no reservation whatever of minerals, whether known or unknown.

The next expression of Congress on the subject of land grants for school purposes we find in the Enabling Act of Oklahoma, passed on June 16, 1906, 34 Statutes at Large, page 273. In that Enabling Act there is granted to the State, upon its admission, four sections of land for school purposes, without any reservation whatever of mineral lands. But in this Enabling Act there would seem to be an express recognition of the fact that Congress intended these sections to pass to the State, whether they contained known or unknown mineral, because the Act provides that where these lands, so granted for school purposes, are valuable for minerals, the State shall not sell the same prior to January 1, 1915, but may lease the same and cover the proceeds derived from such leasing into the funds where they properly belong—that is to say, for school purposes. The language granting these sections to the State of Oklahoma for school purposes is identical with the language used in the Enabling Act of Utah. The policy of the Government, as expressed in the Enabling Act of Oklahoma, which was the next expression after the Utah Enabling Act, was to vest in the State the title to these school sections, whether they contained minerals, known or unknown.

On this question the Court of Appeals (Record, pp. 157, 158) well says:

> "Moreover, while it has been the general practice of the United States to reserve mineral lands from homesteads, pre-emptions, sales and grants to railroad companies, an examination of the grants of lands to States for school purposes *demonstrates the fact that it has been the practice of Congress to determine and declare by legislative act, in each case, and not by any settled public policy, whether or not mineral lands shall be reserved from the grant.* They were not reserved from the grant to Michigan. The grant to Utah is in substantially the same terms. They are not reserved

from the grants of school sections to Wisconsin, Minnesota, Missouri, or Kansas, and the Acts of February 18, 1873, 17 Stat. Ch. 159, and May 5, 1876, expressly provide that the public lands in those States are excepted from the provisions of the Act of May 10, 1872, 17 Stat., 91, and of Section 2318, Rev. Stat. The Enabling Act of Colorado, 18 Stat., 474, expressly provides that all mineral lands shall be excepted from the operation of its grants. The Enabling Act of the State of Washington, 26 Stat., 676, grants the sixteenth and thirty-sixth section in each township for school purposes and then provides that if either of these sections be found to be mineral lands they shall not pass to the State, but other lands in lieu of them may be selected, and the same provision is found in the Enabling Acts of Idaho, Montana, North Dakota, South Dakota, and Wyoming. On the other hand, the Enabling Acts of Florida, May 17, 1856, 11 Stat., 15, and of Oklahoma, June 16, 1906, 34 Stat., 274, grant the school lands without any reservation of the mineral lands, and the latter act contains convincing evidence, in addition to the grant itself, that Congress intended to grant mineral lands in the school sections, for it expressly provides that where the lands granted for school purposes are valuable for minerals the State shall not sell them prior to January 1, 1915, but that it may lease them and apply the proceeds to school purposes. Thus it appears that mineral lands are not excepted from the Congressional grants of school lands to Michigan, Minnesota, Wisconsin, Missouri, Kansas, Florida, and Oklahoma, that they are excepted by express provisions to that effect in the Enabling Acts which grant school sections to Washington, Idaho, Montana, North Dakota, South Dakota, and Wyoming, and that in the latter acts provision is made for the selection of indemnity lands. The grant of school lands to Utah is in substantially the same terms as the grant to Michigan; it contains no exception of mineral lands and no provision for the indemnity lands in lieu of them, and the conclusion is unavoidable that the Acts of Congress *disclose no such settled public policy to except mineral lands from grants of school lands as would sustain*

the courts in amending a grant without such an exception by inserting it, but they demonstrate the fact that Congress has exercised its constitutional power to make grants with and without such exception as its good judgment dictated, and they impose *the duty on the courts not to amend or revoke them by construction, but to enforce them according to their plain terms and certain meaning.*"

VIII.

The Enabling Act is plain and unambiguous and there is no room for Construction.

The language of the Enabling Act, whereby the land grants are made for the support of the common schools, is plain and unambiguous. There is, and can be, no doubt as to the meaning of the words used. It is entirely free from ambiguity. Its phraseology is plain and simple. There is no room for controversy about it. It can admit of but one construction. The language was evidently selected with great care and accuracy and is too exact and luminous to require or admit of any resort to interpretation.

The term "construction" implies an uncertainty as to the meaning, for when the meaning is clear and unambiguous there is nothing to be construed. Where no uncertainty exists, there is no room for construction. When the meaning is plain, another meaning cannot be added by implication or intendment.

Where a statute is plain, the court is not concerned with its wisdom or policy.

Harvester Co. vs. United States, 234 U. S., 199.
Caminetti vs. United States, 61 U. S. (L. Ed.), 192.
Brewer vs. Blougher, 14 Pet. (39 U. S.), 178, 198.

Where a statute is plain and unambiguous, the policy of the Government, with respect to the particular subject dealt with, is the expression of its will, as contained in that statute; and where the language contained in the statute is free from

ambiguity and doubt, the words therein must be given their ordinary meaning, and it is not permissible to insert in the statute other words which change its meaning, or create and insert exceptions which the language of the statute itself does not warrant.

Mr. Sutherland, in his work on Statutory Construction, Sec. 236, uses the following language:

> "If the Legislature has expressed its intention in the law itself with certainty, it is not admissible to depart from that intention on any extraneous consideration or theory of construction."

And in the following section the author says:

> "That when a court is convinced that the Legislature really meant and intended something not expressed by the phraseology of the Act, it will *not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.* If a legislative enactment violates no constitutional provision or principle, *it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage.* Courts have then no power to set it aside or evade its operation by forced and unreasonable construction. If it has been passed improvidently, the responsibility is with the Legislature and not with the courts."

In *Hadden vs. The Collector*, 5 Wall., page 111, it is said by Mr. Justice Field:

> "What is termed the policy of the Government, with reference to any particular legislation, is generally a very uncertain thing, upon which all sorts of opinions each variant from the other may be formed by different persons. *It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.*"

We submit that the language contained in the Enabling Act, by which section 32 was granted to the State of Utah, is plain, certain and unambiguous, and that there is no

room left for construction or interpretation, and that the statute itself clearly and unequivocally sets forth the policy of the Government with respect to these school sections, so far as the State of Utah is concerned.

In *United States vs. Trans-Missouri Freight Assn.*, 166 U. S., 340, Mr. Justice Peckham uses the following language:

> "The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the Government officials; but when the law-making power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

And in the case of *Dewey vs. United States*, 178 U. S., 511, it is said, at page 521:

> "*This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress.* What is termed the policy of the Government, in reference to any particular subject of legislation, this court has said 'is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' * * * *Our province is to declare what the law is, and not, under the guise of interpretation, or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such.* Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress as thus plainly expressed."

See also *United States vs. Fisher*, 2 Cranch, 389.

And *Sturges vs. Crowninshield*, 4 Wheat., 202, wherein it is said:

> "It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other * * * and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision *not contradicted by any other provision in the same instrument* is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

Is there anything, we ask, in the language of the Enabling Act granting these school sections to the State of Utah, for the support of the common schools, which would justify this court in disregarding the plain provisions of the act? Is the language employed in the act such as to lead the court to the conclusion that the framers of that act did not intend what they said? Would the result of giving to the act a construction so as to vest title in the State of Utah to these school sections, for the support of the common schools, even though they should contain minerals, be so monstrous that all mankind would, without hesitation, unite in condemning it?

As said in *Caminetti vs. United States*, 61 U. S. (L. Ed.), 192, at page 196:

> *"If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning."*

So the rule has been stated by this court as follows:

> "If the language be clear, it is conclusive there can be no construction where there is nothing to construe."

United States vs. Hartwell, 6 Wall. (73 U. S.), 385, 396, and:

> "The intention of the legislature is to be collected *from the words they employ.* Where there is no ambiguity in the words, there is no room for construction."
>
> *United States vs. Wiltberger*, 5 Wheat. (18 U. S.), 76, 95.

In *United States vs. Ninety-nine Diamonds*, 139 Fed., 961, it is well said, at page 964:

> "*It is the intention expressed in the statute, and that alone, to which the courts may give effect. They may not assume or presume purposes and intentions that the terms of the statute do not indicate, and then enact or expunge provisions to accomplish these supposed intentions.* Construction and interpretation have no place or office where the language of a statute is unambiguous and its meaning evident. It must be held to mean what it plainly expresses, and no room is left for construction."

And again:

> "Construction and interpretation have no place or office when the language of a statute is unambiguous and its meaning evident. In such a case arguments from the history of legislation, from the possible, or even probable, evil effects of a statute and from the inconvenience of complying with it, and attempted judicial construction of its terms, *serve only to create doubt and to confuse the judgment. They tend to obscure, rather than to elucidate, the meaning of the statute.* (Cites cases.) There is in such case a *conclusive legal presumption that the legislative body intended what it declared*, the statute

must be held to mean what it clearly expresses, and no room is left for construction."

U. S. vs. Alamogordo Lumber Co., 202 Fed., 700, 706.

And again:

"It is the intention expressed in the law or contract, and that only to which courts may lawfully give effect. They may not assume or presume intents or purposes not fairly indicated in the statute and then enact by judicial construction provisions to effect these intentions or purposes, and *the legal presumption is that the legislative body expressed its intention in the statute, that it intended what it expressed, and that it intended nothing more.*"

Soliss vs. Gen. Elec. Co., 213 Fed., 204, 207.

And again:

"The plain and sound principle is to declare *ita lex scripta est*, although so understood the statute leads to absurd and mischievous results, or to consequences not contemplated by the legislature; *for courts are not to inquire as to the motive of the legislature*, nor to depart from a meaning clearly conveyed in unambiguous words, because the statute, as literally understood, appears to lead to unwise consequences or *contravenes public policy.*"

26 A. & E. Ency. L. (2 Ed.), 599.

And again:

"It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, *to go elsewhere in search of conjecture in order to restrict or extend the meaning.* Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. *Courts cannot correct supposed errors, omissions or defects in legislation, or vary by construction, the contracts of parties. The*

office of interpretation is to bring sense out of the words used, and not bring a sense into them."

McCheskey vs. Cromwell, 11 N. Y., 593, 601, 602.

And again:

"It leaves no room for interpretation, for nothing in the language employed is doubtful. We are satisfied, by consideration outside of the language, that the legislature intended to enact something very different from what it did enact. *But it did not carry out its intention; and we cannot take the will for the deed. It is our legitimate function to interpret legislation, but not to supply its omissions."*

Woodbury vs. Berry, 18 Okla. St., 456, at 462, 463.

IX.

Section 2318, Revised Statutes, does not affect the question here.

Appellant relies on section 2318 Revised Statutes of the United States, which provides that:

"In all cases lands valuable for minerals shall be *reserved from sale, except as otherwise directed by law."*

The Enabling Act is complete in itself. It suggests no inquiry or source of information beyond itself to determine its meaning. It is alone the only legitimate evidence of what Congress intended by it.

And as said in *Minnesota vs. Hitcock*, 185 U. S. 373, at 391:

"The State had been admitted into the Union and the rights of the State are to be *determined by the Act of Admission rather than by any prior declaration by Congress of its purpose in respect to certain lands."*

The Enabling Act is unambiguous, and in the language of *Hamilton vs. Rathbone*, 175 U. S., 414, at page 421:

> "Prior acts may be resorted to, *to solve*, but not *to create*, an ambiguity."

The Enabling Act covers the whole subject-matter of the land grants to the State of Utah. It is later than Section 2318, Revised Statutes U. S. It was designed to embrace the entire law on the subject, and operates not cumulatively, but by way of exclusion of earlier acts.

And it is elementary, as laid down in 26 A. & E. Encyc. Law (2 Ed.), at pages 731 and 732, that:

> "Where the later of two acts covers the whole subject-matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such later act will operate as a repeal of the earlier one, although the two are not repugnant."

But aside from that, by its very terms, that section of the Revised Statutes is inapplicable to this case, and furthermore, was expressly repealed by Section 20 of the Enabling Act, which provides:

> "That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislature of said Territory or by Congress, are hereby repealed."

This whole matter is ably disposed of by the Court of Appeals in (Rec., pp. 158 to 160) the following language:

> "Section 2318, Revised Statutes, U. S. Comp. Stat., p. 1423, invoked by counsel for the Government, descended from a provision in Section 5 of 'An Act concerning certain lands granted to the State of Nevada,' approved July 4, 1866, 14 Stat. 86. That act confirmed certain grants to the State of Nevada and made others. Section 5 related to surveys and provided that in surveying the lands in Nevada the lines

of the surveys might so vary that the forms of the tracts would be other than rectangular, and added, 'But in all cases lands valuable for mines of gold, silver, quicksilver, or copper, shall be reserved from sale.' The form in which this provision now appears in the Revised Statutes is, 'In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law.' Sec. 2318, Rev. Stat. *But this provision merely reserves from sale by the United States lands valuable for minerals. It does not prohibit the United States or its Congress from giving or granting such lands for educational or other public purposes, nor does it in any way restrict or limit its legislative power to do so. The grant here in question is not a sale, and Section* 2318 *is inapplicable thereto.*

"For the same reasons the provisions of the act of May 10, 1872, 17 Stat., 91, Ch. 152, section 1, which declares that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be 'free and open to exploration and purchase and the lands in which they are found to occupation and purchase,' and the various statutes under which lands of the United States valuable for coal and other minerals may be acquired by miners, *fail to restrict or limit the power of Congress, to make this grant, or to modify its plain meaning and effect.* They are parts of the general laws of the United States relative to the sale and disposition of its public lands by the officers of its Land Department and they in no way disqualify the Congress itself that made them from disposing of those lands by subsequent grants at any time before the rights of private parties have attached to them under the general laws. Moreover if this view were incorrect and if there were in any of the acts of Congress to which reference has been made, or in any other of its acts, a restriction or prohibition of the grant of the mineral lands in these school sections, *the Congress which made such restriction or prohibition could repeal it in whole or in part, and it has clearly done so to the extent necessary to validate the grant of the mineral lands in the Utah school sections. In the first place, it has made by section six of*

the Enabling Act a clear and certain grant of the four sections in each township without exception or reservation of mineral lands, an enactment sufficient in itself to relieve from any previous prohibition or restriction in the general laws under the familiar rule that where general laws applicable to many subjects, and a special law treating one of those subjects are inconsistent, they must be read together and effect must be given, if possible, to both—to the former as the general law of the land and to the latter as the law of its particular subject. Board of Comm'rs *vs.* Aetna Life Ins. Co., 90 Fed., 222, 227; 32 C. C. A., 585, 590; King *vs.* Pomeroy, 121 Fed., 287, 294; 58 C. C. A., 209, 216; Christie-Street Comm. Co. *vs.* United States, 136 Fed., 326, 333; 69 C. C. A., 464, 471; Hemmer *vs.* United States, 204 Fed., 898, 906, 907; 123 C. C. A., 194, 202, 203; Priddy *vs.* Thompson, 204 Fed., 955, 959,; 123 C. C. A., 277, 281; Gowen *vs.* Harley, 56 Fed., 973, 978, 979; 6 C. C. A., 190, 195, 196; State *vs.* Stoll, 17 Wall., 425, 436. In the second place, the Congress by *section ten of this Enabling Act,* has provided that the 'proceeds of the lands herein granted for educational purposes, except as hereinafter provided, shall constitute a permanent school fund * * * *and such lands shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States,* whether surveyed or unsurveyed, but shall be surveyed for school purposes only.' If the mineral lands in these sections were open to entry or acquisition under the coal-land laws or under any other laws of the United States before this Enabling Act was passed, *here is an express exemption of them from those laws and a devotion of them to the school purposes of the State of Utah.* If under section 2318 they were expressly reserved from grant as well as from sale *'except as otherwise expressly directed by law' here is an express direction by law that they shall be disposed of by grant to the State of Utah for the support of its common schools.* And finally, to make assurance doubly sure, the Congress provided in section 20 of the Enabling Act, that 'all acts or parts of acts in conflict with the provisions of this act whether passed by the legisla-

ture of said Territory or by Congress, *are hereby repealed.*' If there were any previous acts of Congress in conflict with the grant of the four sections in each township in Utah and all the land therein, whether valuable for mineral or not, they were, so far as they related to those sections, unavoidably repealed by this provision of the Enabling Act of Utah. *And this review of the general and special legislation on this subject but serves to strengthen and confirm the conclusion that Congress intended to grant and did grant to the State of Utah by its Enabling Act all the lands valuable for mineral as well as all the other lands in sections two, sixteen, thirty-two and thirty-six in each township in that State, except those expressy reserved by section six.*"

X.

The Departmental Ruling in Utah vs. Allen.

In *State of Utah vs. Allen*, 27 L. D., 53, Secretary Bliss held that mineral lands did not pass to the State under the grant of school lands, though they were not in terms reserved from said grant, because of an assumed "uniform and settled policy of the Government to reserve such lands from grants to States."

The error in that ruling is manifest. It is an isolated ruling and not an established course of departments' practice. But even if it were, the language of the Enabling Act is unambiguous, and as said in *United States vs. Graham*, 110 U. S., 219, at page 221:

> "Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise,

and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous."

Again:

"If it were a question of doubt, the construction given to this clause prior to October, 1855, might be decisive; but as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. (Cites cases.) It is only in cases of doubt that the construction given to an Act by the department charged with the duty of enforcing it becomes material."

U. S. vs. Tanner, 147 U. S., 661; 37 L. Ed., 321, at 322.

And again:

"Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. *A custom of the department, however long continued by successive officers, must yield to the positive language of the statute.*"

Houghton vs. Payne, 194 U. S., 88.

Accordingly, the Court of Appeals (Record, p. 163), well says:

"The opinion of Secretary Bliss in *State vs. Utah*, 27 L. D., 53, 55, to the effect that mineral lands were excepted from the grant of the school sections to Utah, and his opinion in *Florida vs. Railroad Co.*, 56 L. D., 600, 601, that such lands were excepted from the grant of May 17, 1856, to Florida, 11 Stat., 15, have not escaped consideration, but the reasons which have already been stated, perhaps at too much length, have convinced that so far as the grant to Utah is concerned he and the court below were in error in their conclusion and that Congress by the Enabling Act of Utah intended to grant, and did grant, the lands valuable for mineral in the school sections named as clearly and effectually as it granted any land whatever therein."

XI.

Appellant's main reliance is placed upon the cases of *Mining Co. vs. Consolidated Mining Co.*, 102 U. S., 167, and *Deffeback vs. Hawke*, 115 U. S., 392, and *Heydenfeldt vs Daney, etc., Co.*, 93 U. S., 634.

It is elementary that the language of every opinion is to be taken in connection with the facts to which it is applied. An opinion is only authority for the point decided. Dicta are not authority.

As said by Chief Justice Marshall in *Cohen vs. Virginia*, 6 Wheat., 624:

> "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The question actually before the court is investigated with great care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their bearing on all cases is seldom completely investigated."

In *Heydenfeldt vs. Daney Gold & Silver Mining Co.*, 93 U. S., 634, the court affirmed the judgment of the Supreme Court of Nevada, in 10 Nev., 290. The facts were that Heydenfeldt claimed under a patent issued by the State of Nevada on July 14, 1868, conveying lands assumed to have been granted to the State by the Nevada Enabling Act of March 21, 1864. In 1867, and prior to the date of the survey or approval of the survey of the section in controversy, and prior to the State's patent, defendant's predecessor in interest "had entered upon the premises" described "for mining purposes, and had claimed and occupied the same in conformity to the laws, customs,

and usages of miners in the locality and mining district," and "were so possessed and engaged in mining thereon when the said land was first surveyed" and the State's patent issued. Defendant received a patent for the same from the United States on March 2, 1874. The Nevada Enabling Act did not except or reserve mineral lands from the grants therein made. But on July 4, 1866, Congress passed another statute specifically reserving mineral lands from the operation of the grant, and on February 13, 1867, the State legislature passed an act accepting that modification of the original grant. The land was not surveyed until August, 1867.

Accordingly the State court held and said, at 10 Nev., 312, 313:

> "*This State, by its act of acceptance of the grant as modified by the act of Congress of July* 4, 1866, *was estopped from thereafter claiming title to any lands valuable for mines of gold, silver, quicksilver or copper, for such lands were, by said act, expressly reserved from sale.* It is evident that when Congress passed the act of July 4, 1866, it thought that by the effect of the grant and the law of the event, that this State would not acquire an absolute ownership in the lands until the surveys were made; but even if it was mistaken as to the legal effect of the grant, its action received the sanction and approval of this State before the title of the State, under any rule of construction, absolutely attached *to any specific tract of land.* If it be conceded that the State had a vested title to the mineral lands contained in the sixteenth and thirty-sixth sections, prior to the act of February 13, 1867, it is certain that by said act it relinquished its rights thereto, and thereby agreed to accept other lands in lieu thereof.
>
> "*The passage of said act was a recognition by the legislature of this State of the validity of the claim made by the Government of the United States to the mineral lands.*
>
> "*Whatever might, therefore, be the construction of the language of the Enabling Act, as interpreted from the act itself, we think it is controlled by the*

subsequent legislation we have referred to, and that the title of the State to the land conveyed to appellant's grantors was, at the time of the survey thereof, subject to the terms and conditions imposed by the act of Congress of July 4, 1866, and as the portion of said land in controversy in this action was thus 'rich in minerals,' and occupied and claimed by respondent's grantors for mining purposes, the grantors of appellant acquired no title thereto by virtue of the patent issued by this State."

This court applied the doctrine of relation to save the settlers from losing "the labor of years," and said at 93 U. S., pages 640 and 641:

"* * * The act of Congress of July 26, 1866, *supra,* passed before the land in controversy was surveyed, furnishes this protection, by disposing of the mineral lands of the United States to actual occupants and claimants, and providing a method for the acquisition of title. The defendant, and those under whom it claims, occupied the land prior to the survey, and were entitled to purchase. The patent subsequently obtained from the United States *relates back to the time of the original location and entry, and perfects their right to the exclusion of all adverse intervening claims.*

"These views dispose of this case; but there is another ground equally conclusive. Congress, on the 4th of July, 1866, 14 Stat., 85, by an act concerning land granted to the State of Nevada, among other things, reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. *This was doubtless intended as a construction of the grant under consideration;* but whether it be correct or not, and *whatever may be the effect of the grant in its original shape,* it was clearly competent for the grantee to *accept it in its modified form, and agree to the construction put upon it by the grantor.* The State, by its legislative act of February 13, 1867, ratified that construction, and accepted the grant with the conditions annexed.

"We agree with the Supreme Court of Nevada, that this acceptance *'was a recognition by the legislature of the State of the validity of the claim made by the Government of the United States to the mineral lands.*"

Obviously that decision throws no light on the case at bar. The difference between that case and this is too apparent to require further comment.

In *Mining Company vs. Consolidated Mining Company*, 102 U. S., 167, it was held that the grant of the sixteenth and thirty-sixth sections of the public lands to the State of California for school purposes, made by the act of March 3, 1853 (10 Stat., 246), was not intended to cover mineral lands. Such lands were, by the settled policy of the general government, excluded from all grants.

At pages 169-171, in the opinion rendered by Mr. Justice Miller, it is said:

"* * * The granting clause of the sixteenth and thirty-sixth sections of the public lands as thus surveyed, to the State of California, is as follows:

"'Sec. 6. And be it further enacted, that all the public lands in the State of California, whether surveyed or unsurveyed, with the exceptions of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting, also, the lands claimed under any foreign grant or title, *and the mineral lands*, shall be subject to the preemption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed.'

"Section 7 of the act may as well be read here, as it is important to a true solution of the question under consideration.

"'Sec. 7. And be it further enacted, that where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled, "An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for," and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on *mineral lands*.'

"The twelfth section grants to the State seventy-two sections for the use of a seminary of learning, to be selected by the governor or some one appointed by him, in legal subdivisions of not less than a quarter-section, of any unsold, unoccupied and unappropriated public lands: '*Provided, however, that no mineral lands* or lands reserved for any public purpose whatever, or lands to which any settler may be entitled under the provisions of this act, shall be subject to such selection.'

"The *thirteenth section* also grants the State ten sections of land for the purpose of erecting the public buildings of the State, *with the same proviso as the one to section 12*.

"*The proviso to the third section is also relied upon as indicative of the purpose of Congress in regard to the mineral lands of California.* That section contains the authority under which the surveyor-general is to act in surveying the public lands in that State, and after investing him with the powers conferred on other surveyors-general, and prescribing

some specific directions for the survey of private land claims, it is *'Provided, that none other than township lines shall be surveyed where the lands are mineral*, or are deemed unfit for cultivation; and no allowance shall be made for such lines as are not actually run and marked in the field, and were actually necessary to be run.'

* * * * * * *

"It is quite unnecessary to enter upon this question, which has been before us in so many shapes; for, if it be conceded that *such would be the effect of the statute if there were no words of exception in the grant*, Congress has, in nearly every case where the question has arisen, made such specific exceptions to the operation of the grant as to decide the matter without resort to the rule of construction asserted by plaintiffs."

And at page 173:

"But this right of pre-emption, on unsurveyed lands, was by this statute to last but one year; *and so careful was Congress to protect mineral lands from sale and pre-emption, that, as we have already shown by the proviso to Sect. 3 of the act, the surveyors were forbidden to extend their surveys over them.*

"The effect of this was as Congress intended it should be, that, *as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption*, or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise.

"It is a strong corroboration of this view that Congress, in Sect. 12 of this same statute giving the State seventy-two sections for a seminary of learning, *declares that no mineral lands shall be taken under the*

> *grant*, and makes the same reservation of its mineral lands in the grant for the erection of public buildings in the State."

The difference between the California Statute and the Utah Statute is manifest. The California Act was plastered with reservations of mineral lands.

In differentiating that case, the Court of Appeals (Rec., pp. 160 to 163) well says:

> "It is contended that the decisions of the Supreme Court in *Mining Co. vs. Consolidated Mng. Co.*, 102 U. S., 167, and *Deffeback vs. Hawke*, 115 U. S., 392, sustain the view that the courts should amend the Enabling Act of Utah by revoking its grant of the mineral lands in the school sections and adding to section six an exception of these lands from the grant. Let us see. *It is a familiar rule of construction that every decision of a court should be considered and given effect in the light of the facts which conditioned it. In the case in hand the United States had granted to the State of Utah by plain unequivocal words without any exception of mineral lands the four school sections in each township in 1894.* Twelve years later the State contracted to sell this land to Mr. Badger. *In reliance upon this plain grant and the States' contract with Mr. Badger*, Mr. Sweet, the original defendant, purchased that contract, paid the purchase price of section thirty-two, the land here in controversy, $1,920.00, to the State in 1907, and asked the State for his deed, when, for the first time, the United States by this suit sought to revoke its grant of that section and to recover the land. After waiting twelve years and until the defendant had paid the full price of the land to the State, from which he could not recover it before commencing its suit to amend its grant, and after waiting six more years before submitting its case to the court below, more than eighteen years after the grant, the United States appeals to a Court of Chancery to revoke its plain grant of mineral lands in this section thirty-two, to impose a loss of $1,920.00 and interest upon the defendant and by its judicial decision to except all mineral lands

from the plain grant of them. The equities of the United States appeal to the conscience of a chancellor with no greater or less force than those of a private individual under like circumstances. State of Iowa *vs.* Carr, 191 Fed., 257, 266; 112 C. C. A., 477, 486; United States *vs.* Detroit Timber and Lumber Co., 131 Fed., 668, 677; 67 C. C. A., 1, 10; United States *vs.* Chandler-Dunbar Water Power Co., 152 Fed., 25, 26, 27, 37, 38, 40, 41; 81 C. C. A., 221, 222, 223, 233, 234, 236, 237; United States *vs.* Stinson, 125 Fed., 907, 910; 60 C. C. A., 615, 618; State of Michigan *vs.* Jackson, L. & S. R. Co., 69 Fed., 116, 122; 16 C. C. A., 345, 351; United States *vs.* Stinson, 197 U. S., 200, 204, 205; United States *vs.* Chicago, M. & St. Paul Ry. Co., C. C. A., 172 Fed., 271, 276; United States *vs.* California and Oregon Land Co., 148 U. S., 31, 41; Carr *vs.* United States, 98 U. S., 433, 438."

"And one who, by material misrepresentation or by silence when he ought to speak out, induces an innocent person to so change his situation that he will suffer substantial loss if the former takes advantage of the truth which he misrepresented, or of the silence which he ought to have broken, is in equity estopped from so doing. If a private owner of this land had conveyed it to a third person, if that conveyance had become a public record immediately, if the grantee had contracted thereafter to convey it to a fourth person and another had purchased that contract and paid the purchase price to the third person in reliance upon the conveyance twelve years after it was made, no court of equity would fail to hold that the grantor was thereafter estopped from avoiding that conveyance. And when to these facts are added the fact that *the highest court in the land had twice held before Mr. Sweet bought the land in controversy that a grant in like terms conveyed the mineral lands in the school sections, Cooper vs. Roberts*, 18 How., 173, 177; *Roberts vs. Cooper*, 20 How., 467, 484, 485, all the equities in the case at bar are with the defendant. What was the case of *Mining Co. vs. Consolidated Mining Co.*, 102 U. S., 167? The plaintiff in that case sought to recover land in a school section under the act of March 3, 1853, 10 Stat., chap. 45, pages 244, 246, from the de-

fendants who were in possession of the land under mining claims which had been instituted in 1851, 1853, and 1863, under the mining laws and customs of Spain and the United States. *Some of the defendant's claims had been instituted before the act of 1853 was passed*, and there was a town of some four hundred inhabitants on the land at that time. In the face of these claims and this possession the claim of the plaintiff was originated by its predecessor in interest by an application in 1870 to the State of California to purchase the land from it, followed by a conveyance. The claims of the defendant had passed to patent in 1873, under the United States mining laws and customs. *In other words, the claims of the defendant were prior in time, rested on the mining laws and customs, were supported by prior mining operations, possession and occupation. The claims of the plaintiff were subsequent and apparently speculative and the equities of the case were with the claimants under the mining laws.*

"*The case now in hand and the Michigan case arise on plain grants of school sections in simple enabling acts, in special acts for these particular purposes.* But the act of March 3, 1853, under which the Mining Company's case arose, is a *general law* for the disposition of the public lands in California and it is full of provisions relating to subjects other than those treated in the Michigan and Utah acts. It is entitled 'An act to provide for the survey of the public lands in California, the granting of preemption rights and for other purposes.' It provides for the appointment of a surveyor general for land districts and registers and receivers of land offices. Section 3 expressly *prohibits the survey of mineral lands into sections, thereby effectually preventing the selection of school sections from the mineral lands.* Section five, declares that all the public lands in California 'with the exceptions of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township,' and with the exception of certain other lands and the *mineral lands*, shall be subject to preemption, home-tead, etc., and in this quoted exception is the entire grant of the California school lands.

Section six excepts *mineral lands* from pre-emption. Section seven expressly provides that where any settlement has been made on school sections, or parts of them have been otherwise taken, lands in lieu thereof may be selected, * * * nor shall any person obtain the benefits of this act by a settlement or location on *mineral land;* and the *Supreme Court held, among other conclusions, that the settlement and occupation of the lands in the Mining Co. case excepted them from the grant under this section (102 U. S., 176), a fact inapplicable to the case in hand.* Section eight deals with 'the public lands not mineral lands.' Section twelve grants to California ten sections of land for public buildings to be selected by the governor, 'provided, however, that none of said selections shall be made of *mineral lands* or lands reserved for any public purpose,' etc., and section thirteen contains a similar grant and proviso. The Supreme Court, *perceiving the compelling equities of the defendant* and of miners in California who had claimed and operated mines under the Spanish and United States customs and laws of mining before and after the passage of the act of 1853, reviewed that act, *and influenced, among other things, by the prohibition of the survey into sections of mineral lands* found in section three (102 U. S., 173, 174), the express reservations of mineral lands from pre-emption in section six, and the express reservations of mineral lands from the grants in sections twelve and thirteen, held that it was not the intention of Congress by the act of 1853 to grant, and it did not grant, lands valuable for minerals to the State of California for school purposes, and *that even if it did, the lands in controversy were excepted from the grant by the settlement and occupation thereof prior to the time the act was passed.* But none of the reservations or exceptions of mineral lands in the act of 1853, which led the Supreme Court to that conclusion, *and no like reservations or exceptions are found in the Utah act,* although several grants of land in addition to the grant of the school sections were made thereby, and a careful consideration of the act of 1853, the fact of the Mining Co.'s case, and the exhaustive opinion therein have left no doubt that

> *neither the decision in that case nor the reasons for it are controlling of or applicable to the case in hand. The facts and the grant in this case are not at all analogous to those in the Mining Company's case. They are not only analogous, but substantially identical, so far as the legal question* is concerned, with the Michigan case; and the opinions in that case and the stronger reasons persuade that the decisions therein should control and that the grant of the school sections to the State of Utah should be held to include the mineral as well as the non-mineral land therein."

So, also, says the Court of Appeals (Rec. 163):

> "The opinion in Deffeback *vs.* Hawke, 115, U. S. 392 has been thoughfully read and considered. But that case presented for decision no question of the power of Congress to grant, or of the effect of its grant of lands for school or other public purposes, and whatever may be found in the opinion sufficiently general in its term possibly to include that subject, appears to have been said without intent to decide any such question in discussing the disposition of the public lands by the executive officers of the Government under the general land laws. The question there at issue was whether claims to the land in dispute under the mining laws or claims to it under the townsite laws were superior, and the opinion and decision is neither controlling nor persuasive upon the issues in this case."

The construction placed upon the Enabling Act by the Circuit Court of Appeals, we respectfully submit, is the only proper construction to be placed thereon, and that by so construing this act no great question of national policy is involved as only the public lands granted to the State of Utah can, by any possibility be affected.

Respectfully submitted,

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APPENDIX.

Enabling Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah, as hereinafter provided.

Sec. 2. That all male citizens of the United States over the age of twenty-one years who have resided in said Territory for one year next prior to such election are hereby authorized to vote for and choose delegates to form a convention in said Territory. Such delegates shall possess the qualifications of such electors; and the aforesaid convention shall consist of one hundred and seven delegates, apportioned among the several counties within the limits of the proposed State as follows: Beaver County, two delegates; Box Elder County, four delegates; Cache County, eight delegates; Davis County, three delegates; Emery County, three delegates; Garfield County, one delegate; Grand County, one delegate; Iron County, one delegate; Juab County, three delegates; Kane County, one delegate; Millard County, two delegates; Morgan County, one delegate; Piute County, one delegate; Rich County, one delegate; Salt Lake County, twenty-nine delegates, thus apportioned, to-wit: Salt Lake City, first precinct, four delegates; second precinct, six delegates; third precinct, five delegates; fourth precinct, three delegates; fifth precinct, three delegates; all other precincts in said county outside of Salt Lake City, eight delegates; San Juan County, one delegate; San Pete County, seven delegates; Sevier County, three delegates; Summit County, four delegates;

Tooele County, two delegates; Uintah County, one delegate; Utah County, twelve delegates; Wasatch County, two delegates; Washington County, two delegates; Wayne County, one delegate, and Weber County, eleven delegates; and the Governor of said Territory shall, on the first day of August, eighteen hundred and ninety-four, issue a proclamation ordering an election of the delegates aforesaid in said Territory, to be held on the Tuesday next after the first Monday in November following. The board of commissioners known as the Utah Commission is hereby authorized and required to cause a new and complete registration of voters of said Territory to be made under the provisions of the laws of the United States and said Territory, except that the oath required for registration under said laws shall be so modified as to test the qualifications of the electors as prescribed in this act, such new registration to be made as nearly conformable with the provisions of such laws as may be; and such election for delegates shall be conducted, the returns made, the result ascertained, and the certificate of persons elected to such convention issued in the same manner as is prescribed by the laws of said Territory regulating elections therein of members of the Legislature. Persons possessing the qualifications entitling them to vote for delegates under this act shall be entitled to vote on the ratification or rejection of the Constitution, under such rules or regulations as said convention may prescribe, not in conflict with this act.

SEC. 3. That the delegates to the convention thus elected shall meet at the seat of government of said Territory on the first Monday in March, eighteen hundred and ninety-five, and, after organization, shall declare on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and State government for said proposed State.

The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not to be repug-

nant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide by ordinance irrevocable without the consent of the United States and the people of said State—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship; *Provided*, That polygamous or plural marriages are forever prohibited.

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territory,

under authority of the Legislative Assembly thereof, shall be assumed and paid by said State.

Fourth. That provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control.

Sec. 4. That in case a constitution and State government shall be formed in compliance with the provisions of this act, the convention forming the same shall provide by ordinance for submitting said constitution to the people of said State for its ratification or rejection, at an election to be held on the Tuesday next after the first Monday in November, eighteen hundred and ninety-five, at which election the qualified voters of said proposed State shall vote directly for or against the proposed constitution, and for or against any provisions separately submitted. The return of said election shall be made to the said Utah Commission, who shall cause the same to be canvassed, and if a majority of the votes cast on that question shall be for the constitution, shall certify the result to the President of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the Constitution and government of said proposed State are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of said election, and thereupon the proposed State of Utah shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original States, from and after the date of said proclamation.

Sec. 5. That until the next general census, or until otherwise provided by law, said State shall be entitled to one Representative in the House of Representatives of the United States, which Representative in the Fifty-fourth Congress,

together with the Governor and other officers provided for in said constitution, may be elected on the same day of the election for the adoption of the contitution; and until said State officers are elected and qualified under the provisions of the Constitution, and the State is admitted into the Union, the Territorial officers shall continue to discharge the duties of the respective offices in said Territory.

Sec. 6. That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior; *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

Sec. 7. That upon the admission of said State into the Union, in accordance with the provisions of this act, one hundred sections of the unappropriated lands within said State to be selected and located in legal subdivisions, as provided in section six of this act, shall be, and are hereby, granted to said State for the purpose of erecting public buildings at the capital of said State, when permanently located, for legislative, executive, and judicial purposes.

Sec. 8. That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby granted to the State of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portions of said lands that may not have been selected by said Territory may be selected by said State. That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and including all saline lands in said State, are hereby granted to said State, for the use of said University, and two hundred thousand acres for the use of an Agriculture College therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested and held by said State, and the income thereof to be used exclusively for the purposes of such University and Agricultural College, respectively.

Sec. 9. That five per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State.

Sec. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such lands shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only.

Sec. 11. The schools, colleges, and University provided for in this act shall forever remain under the exclusive control of said State, and no part of the proceeds arising from

the sale or disposal of any lands herein granted for educational purposes, or of the income thereof, shall be used for the support of any sectarian or denominational school, college or university.

Sec. 12. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to said State, and in lieu of any claim or demand by the State of Utah under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, which grant, it is hereby declared, is not extended to said State of Utah, the following grants of lands are hereby made to said State, for the purposes indicated, namely:

For the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres; for the establishment and maintenance of an insane asylum, one hundred thousand acres; for the establishment and maintenance of a school of mines in connection with the University, one hundred thousand acres; for the establishment and maintenance of a deaf and dumb asylum, one hundred thousand acres; for the establishment and maintenance of a reform school, one hundred thousand acres; for the establishment and maintenance of State normal schools, one hundred thousand acres; for the establishment and maintenance of an institution for the blind, one hundred thousand acres; for a miners' hospital for disabled miners, fifty thousand acres. The United States penitentiary near Salt Lake City and all lands and appurtenances connected therewith and set apart and reserved therefor are hereby granted to the State of Utah.

The said State of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act; and the lands granted in this section

shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature of the State may provide.

Sec. 13. That all land granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the unappropriated public lands of the United States within the limits of the said State of Utah.

Sec. 14. That the State of Utah shall constitute one judicial district, which shall be called the district of Utah, and the circuit and district courts thereof shall be held at the capital of this State for the time being. The judge of said district shall receive a yearly salary of five thousand dollars, payable monthly, and shall reside in his district. There shall be appointed clerks of said courts, who shall keep their offices at the capital of said State. There shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The regular terms of said courts shall be held at the place aforesaid on the first Monday in April and the first Monday in November of each year. For judicial purposes, the district of Utah shall be attached to the eighth judicial circuit, and only one grand jury and one petit jury shall be summoned in both of said courts.

Sec. 15. That the circuit and district courts for the district of Utah and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties possessed and required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations.

Sec. 16. That the marshal, district attorney, and clerks of the circuit and district courts of the said district of Utah, and all other officers and other persons performing duty in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts

of the United States, and shall, for the services they may perform, receive the same fees and compensation allowed by law to other similar officers and persons performing similar duties.

Sec. 17. That the convention herein provided for shall have the power to provide, by ordinance, for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the Territory of Utah at the time of the admission of the said State into the Union, to such courts as shall be established under the Constitution to be thus formed, or to the circuit or district court of the United States for the district of Utah; and no indictment, action, or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the State or United States courts according to the laws thereof, respectively. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the supreme court of said Territory, or that may hereafter lawfully be prosecuted upon any record from said court, may be heard and determined by said Supreme Court of the United States; and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the circuit or district court hereby established within the said State from or to the supreme court of such State, as the nature of the case may require. And the circuit, district, and State courts herein named shall, respectively, be the successors of the supreme court of the Territory as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of the Territory, mentioned in this act, in any case arising within the limits of the proposed State prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as

they shall have had by the law prior to the admission of said State into the Union.

Sec. 18. That the sum of thirty thousand dollars, or so much thereof as may be necessary is hereby appropriated out of any money in the treasury not otherwise appropriated to said Territory for defraying the expenses of said convention and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the Territorial Legislature.

Sec. 19. That the constitutional convention may, by ordinance, provide for the election of officers for a full State government, including members of the Legislature and Representative in the Fifty-fourth Congress, at the time for the election for the ratification or rejection of the Constitution; but the said State government shall remain in abeyance until the State shall be admitted into the Union as proposed by this act. In case the Constitution of said State shall be ratified by the people, but not otherwise, the Legislature thereof may assemble, organize, and elect two Senators of the United States in the manner now prescribed by the laws of the United States; and the Governor and Secretary of State of the proposed State shall certify the election of the Senators and Representative in the manner required by law, and when such State is admitted into the Union, as provided in this act, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the State government formed in pursuance of said Constitution, as provided by the constitutional convention, shall proceed to exercise all the functions of State officers; and all laws in force made by said Territory at the time of its admission into the Union shall be in force in said State, except as modified or changed by this act or by the Constitution of the State; and the laws of the United States shall have

the same force and effect within the said State as elsewhere within the United States.

Sec. 20. That all acts or parts of acts in conflict with the provisions of this act whether passed by the Legislature of said Territory or by Congress, are hereby repealed.

Approved July 16, 1894.